SENATE—*Monday, September 15, 1986*

The Senate met at 11 a.m., and was called to order by the Honorable JOHN C. DANFORTH, a Senator from the State of Missouri.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray.

God that made the world and all things therein, Lord of Heaven and Earth, dwelleth not in temples made with hands; neither is worshipped with men's hands, as though He needed anything, seeing He giveth to all life, and breath, and all things * * *.—Acts 17:24-25.

Lord of life, it is superfluous to invoke Your presence in this place for You are here as You are everywhere. We acknowledge Your presence and ask for Your wisdom and guidance for the Senate this week that the impossible may be done—the people served—truth and justice prevail.

As our city hosts 10,000 men and women from nearly 100 nations at the World Congress on Cardiology, we praise You, O God, for life. Thank You for the human heart—this awesome muscle without which life would be impossible. What makes it start? What keeps it going—like perpetual motion, pumping 70 times a minute, hour after hour, year after year, filling our bodies with energy?

Forgive us, Lord, when we presume upon this indispensable gift—when we neglect it—abuse it. Help us to appreciate it—treasure it—take its health seriously. Thank you, gracious Father, for men and women dedicated to the human heart—its care, its health, its preservation. Bless them this week in our city as they devote themselves to becoming increasingly proficient in the care of the human heart. Bless You, Lord, for this remarkable gift to us. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. THURMOND].

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, September 15, 1986.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JOHN C. DANFORTH, a Senator from the State of Missouri, to perform the duties of the Chair.

STROM THURMOND,
President pro tempore.

Mr. DANFORTH thereupon assumed the Chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the majority leader is recognized.

Mr. DOLE. Mr. President, I thank the distinguished Presiding Officer, the distinguished Senator from Missouri [Mr. DANFORTH].

SCHEDULE

Mr. DOLE. At 12 noon today, the Senate will resume executive session to consider the nomination of Justice Rehnquist to become Chief Justice of the Supreme Court. It is also my hope that later this afternoon we can dispose of the Interior appropriations bill, though I recall, I indicated on Friday there would be no votes today, so if we cannot do it without a vote that may create a problem. But we could have the vote set over to tomorrow. It would be my hope that we could on tomorrow complete action on the Rehnquist nomination; also, on the Scalia nomination; and also, if we can work it out, the Interior appropriations bill. So there is no question about it, there will be votes tomorrow. I am not certain when they will begin, but I assume sometime after the policy luncheons which start at 12 and end at 2 o'clock.

On Wednesday, depending on discussions with the distinguished chairman of the Budget Committee, it is quite likely we will go to the reconciliation bill. That is under a statutory time agreement. There will be, as I have discussed with the distinguished minority leader, a time that evening made available. In other words, there will be a wide window there. I know there are many obligations on both sides in early evening.

There will be, of course, a session on Thursday. There will be a session on Friday. I do not anticipate at this point a Saturday session but probably on the next weekend there could be a Saturday session, depending on where we are in completing what we must do before we adjourn on October 3. I say adjourn. I would hope to imply by that we would not be coming back after the election. Even though we have a rather large amount of work to do, I still believe we can complete it.

PRESIDENT AND FIRST LADY CRUSADE AGAINST DRUGS

Mr. DOLE. Mr. President, I congratulate the President and the First Lady for their stirring "heart-to-heart talk" with America last night. Their personal, nonpartisan message underscored the seriousness of the drug problem and made clear the high priority the President has given the drug crisis. It was a fine opening salvo in the war against drugs.

I stand ready to work with the President, and leaders in both parties, to help turn the corner on the tragedy of drug abuse.

Already, some very good initiatives have been introduced in both Houses, from both parties. This week, I plan to introduce a comprehensive antidrug package. It will use the administration's proposal as its foundation, and as such it will support a substantial Senate Republican amendment that will include some of the initiatives of the bipartisan House package and some of the good initiatives in the package introduced, last Tuesday I believe, by my Democratic colleagues in the Senate led by the distinguished minority leader.

Mr. President, before we push ahead into our legislative attack on drugs, I especially want to commend the First Lady for her continued leadership on the drug front. Her dedication and concern will serve as a beacon for all of us, as we unite for a full-scale assault on the drug epidemic.

The Nation owes her a special debt of gratitude. The President and the First Lady have set the pace—it is now our responsibility to follow. There is no time to lose.

THE SENATE CAN FINISH ITS WORK

Mr. DOLE. Mr. President, let me also indicate we are getting to that stage which happens every time a Congress is about to wind up as to whether we can finish our work, and again I believe we can. I am an optimist at heart. I know there are a number of things that are must pieces of legislation. There are other matters that Senators would like to bring up. I know trade is a matter of great importance to Members on both sides; product liability is a matter of great urgency with the American people, and we intend to bring up product liability. I am not certain for how long we can bring it up. It depends on whether we can get a time agreement. The same with trade. If we have a trade bill,

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

hopefully bipartisan, then there may be some way to pass it. But if somebody offers a textile bill, for example, then I assume we are in for a long debate and we do not really have time for long debates.

But this week, as I have indicated, I hope we can dispose of the Supreme Court nominations and then move to budgetary matters; namely, the reconciliation savings package.

Now, there are some who would say, "Well, we have too much backed up in the waning days of the session." My view is and has always been that when you have a lot of work to do, the only response is to get right down to business. I think that will call upon all of us to probably put in some long hours between now and October 3, but in my discussions with the distinguished minority leader I think we agree we ought to be able to finish by then. We do not want to extend the session to the 10th of October. We do not want to come back after the election.

However, I do want to offer a few words of encouragement, because we have been down this road before. It is not without precedent that when you get to the end—in fact, there is a lot of precedent, whether it is a State legislative body or the Senate or the House—that there is always a rush to get things done. We have passed only three appropriations bills this year. We hope do another two or three before the week is out. As I have indicated, a number of remaining bills, should be acted upon during the last week of the session.

Some would say, "Well, the Senate is slowing down, it is out of control, TV has taken over." I do not share that view. In fact, I am going to place in the RECORD some information that indicates how many days and how many hours we have been in session over the past years, and I think it will reflect that we are doing quite well.

I ask unanimous consent to have printed in the RECORD a chart showing the party ratios, the number of days in session, the hours in session, in every Congress since the 94th Congress.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

Congress	Dates	Majority leader	Party ratio	Days in session	Time in session
94th I	Jan. 14 to Dec. 19, 1975	Mansfield	60D [1]–38R–1 Ind [2]	178	1,177 hrs., 11'.
94th II	Jan. 19 to Oct. 1, 19765	do	61D [1]–38R–1 Ind	142	1,033 hrs., 01'.
95th I	Jan. 4 to Dec. 15, 1977	Byrd	61D [1]–38R–1 Ind	178	1,143 hrs., 42'.
95th II	Jan. 19 to Oct. 15, 1978	do	do	159	1,366 hrs., 22'.
96th I	Jan. 15 to Dec. 20, 1979	do	58D–41R–1 Ind	167	1,159 hrs., 01'.
96th II	Jan. 3 to Dec. 16, 1980	do	do	166	1,165 hrs., 10'.
97th I	Jan. 5 to Dec. 16, 1981	Baker	53$–46D–1 Ind	165	1,079 hrs., 54'.
97th II	Jan. 25 to Dec. 23, 1982	do	do	147	1,079 hrs., 55'.
98th I	Jan. 3 to Nov. 18, 1983	do	55R–45D	150	1,010 hrs., 47'.
98th II	Jan. 23 to Oct. 12, 1984	do	do	131	940 hrs., 25'.
99th I	Jan. 3 to Nov.30, 1985	Dole	53R–47D	155	1,128 hrs., 00'.
99th II	Jan. 21 to Aug. 16, 1986	do	do	112	937 hrs., 34'.

[1] Open seat, contested election in New Hampshire.
[2] Senator Harry Byrd, Virginia Independent.

Note: Figures taken from the Congressional Record Daily Digest "Resume of Congressional Activity."

Mr. DOLE. Mr. President, I think the chart is helpful. If there are those who would say that we are delaying the Nation's business because of television or whatever, or that we are out of control and we are putting in long hours, which we are, they will see, in perspective, that everything looks pretty good.

I am confident that we are going to have a lot of action the next 3 weeks. We are going to have a lot of bipartisan cooperation, and we are going to adjourn—unless by some unforeseen problem we cannot—on the 3d of October.

So what I am suggesting, as I have indicated, is that there probably will be no session this coming Saturday, but I would not foreclose a session on the following Saturday and on October 4, if necessary. There might be a session then. That is a holiday for some of our colleagues.

RECOGNITION OF THE DEMOCRATIC LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the Democratic leader is recognized.

Mr. BYRD. I thank the Chair.

THE WORK OF THE SENATE

Mr. BYRD. Mr. President, I join the distinguished majority leader in not only expressing the hope but also in urging that all of us work hard to complete the business of the Senate by the close of business on October 3.

The number of days or the number of hours are important only to the extent that the Senate is doing something on those days and in those hours. The Senate can be in session a great number of days and a great number of hours, but if it is doing nothing much in getting its work done, then the number of days, in itself, is not determinative of the quality of the work that is being done or the amount of work that is being done.

Incidentally, I have never heard that television coverage was slowing down the Senate. From what I have seen of television, as I perceive it, the debates have been more probative, more substantive. I think the debates have been better since we have had television and radio coverage of the Senate.

I must say that I am a little surprised to hear that anyone has complained of television coverage as having slowed down the Senate. It comes as somewhat of a disappointment and surprise to me. I have not heard this. If that is being said, I would certainly be the first to help debunk the idea that television coverage is slowing down the work of the Senate.

I stay on the floor of the Senate as much as does anybody. The distinguished majority leader and I are here as long, as early, and as late as anybody else in the Senate; and there is nothing to support the contention that television coverage is slowing down the work of the Senate.

Mr. President, I am willing and ready to stand with the distinguished majority leader if he feels that we should come in this Saturday as well as on either or both of the other two Saturdays. There is a lot of work to be done, and I hope we would not wait until the last week to take up the continuing resolution, for example. Our timing, to some extent, is affected by the work of the House in that regard. The continuing resolution is not over from the House yet, but as soon as it comes over from the House, it seems to me that the Senate ought to get busy on it. I am sure that the Appropriations Committee of the Senate will do that. But the earlier we get the continuing resolution before the Senate, the better.

One of the things that can keep us here the longest is the continuing resolution, because that is a lightning rod for so many amendments of all kinds, germane and otherwise.

The distinguished majority leader has a job to do. He has a responsibility to perform. I have a job and a responsibility. Those responsibilities that are incumbent upon us as leaders do not make it easy for us to be liked among our colleagues. We have to get this job done. We can elect to go out on the 3d and come back after the election, or we can elect to proceed after the 3d and go for the next week before we go

out for the election. But I join the majority leader in saying that I believe we can get the work done by the close of business on October 3. It is not going to be easy; I believe we can do it. It is going to require a great deal of effort and some long hours, and maybe we cannot do it. But I join the leader in saying that we ought to do it, and we are going to do it if it can be done. Part of that will depend upon the House. But let us try to get it done.

The majority leader is spending a good bit of time on the Rehnquist nomination, which he has to do, and perhaps that is pushing off some of the other work. However, as he has indicated, if there is a lapse during the debate on that matter today, he will try to bring up the Interior bill.

I hope the distinguished majority leader will not be criticized for his efforts in keeping the Senate in and working late, but I only offer the one caveat, that we not wait until either the next week or the last week to start doing that. The platter is full and maybe we should do it earlier rather than later. That is my only suggestion; and in making that suggestion, I carry part of the responsibility here for trying to inveigh on my colleagues to be ready, ready to manage bills, and ready to call up their amendments earlier rather than later.

Mr. President, with that, I ask the majority leader if he could proceed now with the two items that are on the Calendar of the Bills and Joint Resolutions Read the First Time, and dispose of that matter at this point, rather than at the close of morning business.

□ 1120

DRUG ABUSE COMBAT POLICY

The ACTING PRESIDENT pro tempore. The clerk will read S. 2798 for the second time.

The legislative clerk read as follows:

A bill (S. 2798) to establish and implement a comprehensive policy to combat drug abuse in the United States.

Mr. DOLE. Mr. President, I object to any further consideration.

The ACTING PRESIDENT pro tempore. Under rule XIV, the bill will be placed on the calendar.

SUPREME COURT POLICE

The ACTING PRESIDENT pro tempore. The clerk will read S. 2814 for the second time.

The legislative clerk read as follows:

A bill (S. 2814) to preserve the authority of the Supreme Court Police to provide protective services for Justices and Court personnel.

Mr. DOLE. Mr. President, I object to any further consideration of S. 2814.

The ACTING PRESIDENT pro tempore. Under rule XIV, the bill will be placed on the calendar.

Mr. BYRD. Mr. President, I thank the distinguished majority leader.

I yield the floor.

RECOGNITION OF SENATOR PROXMIRE

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Wisconsin is recognized for not to exceed 5 minutes.

TV IN THE SENATE

Mr. PROXMIRE. Mr. President, I hesitate to disagree with my good friend, the minority leader, Senator BYRD. I agree with him on almost everything. I disagree with him on TV in the Senate.

I disagree with him on TV in the Senate for several reasons. I think it may have prolonged the sessions of the Senate so far, but if it has done so, it has done so by mistake. It has done so on the assumption that people are watching what we are doing in the Senate on television.

I submit they are not. On TV in the Senate I receive no mail, literally not one letter. I receive 1,000 letters a day. I get none on anything I said on the floor or anyone else said on the floor. I receive none from people from what they have seen on television.

I think it is something that the membership realizes is not having any impact.

I think we go back to the old bad habits and continue as we have before. The bad habits will be better, however, than the worse habits we adopted since television is prolonging the debate, implying that somehow we are addressing the vast audience of millions of people.

I get letters from people who were in the gallery. They see me in Wisconsin when I go out to the State and shake hands.

People say, "I saw you on the floor of the Senate."

I ask: "Did you see me on television?" "No."

They are sitting in the gallery watching it.

So I think this is a myth that anyone is watching us on television. I would not be surprised if it were announced that the cameras have not yet been turned on for the last several weeks, that we have been under the illusion we have been operating on television, but we have not been.

TIME HAS COME TO ACT ON ARMS CONTROL

Mr. PROXMIRE. Mr. President, in this era of the collapse of arms control agreements such as the SALT II Treaty and the ABM Treaty, it is an astonishing irony that there are more widespread discussions between the super powers on arms control matters going on than ever. Consider the sweep of current peace negotiations. At Geneva, Switzerland nuclear and space arms talks have been continuing since March of 1985. A sixth round of these meetings will begin on September 18. Also at Geneva a conference on a total ban of chemical weapons concluded one session on August 29. It will resume later this year. Concurrently the super powers are meeting now and will continue to meet until September 19 in Stockholm to negotiate ways of reducing the risk of accidental war. The goal of this negotiation is the notification of each super power by the other of the movement or military exercise of NATO or Warsaw Pact troops in Europe. Meanwhile in Vienna, Soviet and United States negotiators are conferring on the reduction of NATO and Warsaw Pact troops stationed in central Europe. Concurrently, negotiators Paul Nitze representing the United States and Victor Karpov for the Soviets have been meeting in Moscow and Washington to seek a basis for progress in the Schultz-Shevadanaze meeting that will in turn try to set an agenda for the likely summit meeting between President Reagan and Secretary Gorbachev later this year.

But all this is only the beginning. The super powers have been meeting in Bern, Switzerland this month to negotiate a curb on the spread of chemical weapons. And back in Geneva technical experts have been meeting in an entirely different forum to try to reach some super power accommodation on nuclear testing. As we know, the United States is trying to reach agreement on the verification of underground nuclear weapons test explosions. The Soviets want an outright and total ban on such tests. Also in Geneva a separate task force of United States and Soviet negotiators has been meeting to set up nuclear risk reduction centers in Moscow and Washington. The centers would exchange information about strategic exercises and missile tests. Geneva is also the site for continuing current meetings of the Standing Consultative Commission. This Commission was established by the ABM Treaty of 1972 to provide a forum for reconciling differences over allegations of violation of strategic arms control treaties. The Commission met in July. It will meet again in October.

In addition to this series of super power arms control parleys there have also been super power conferences on nuclear energy issues, separate meetings on developing agreements to reduce the risk of superpower confrontations at sea, discussions in both Washington and Moscow over regional

problems such as in South Africa, Afghanistan, and Central America. Superpower conferences also continue in Washington and Moscow on cultural and scientific exchanges and trade and human rights.

Mr. President, all of this remarkable series of discussions is taking place at a time when Marshall Shulman, the director of the Institute for Advanced Study of the Soviet Union at Columbia University declares that in the more than 40 years he has intensively studied the Soviet Union, there has never been a time when the Soviets were more willing to negotiate peace-promoting agreements with the United States than they are now.

What an irony that at this time when the opportunities for advancing the cause of peace are better than they have been since the end of World War II arms control is in greater disarray than it has been at any time since the dawn of the nuclear age. Why should this be? Should we wait to negotiate until the United States and NATO have further built their military power? No. Here's why. Obviously the United States negotiates right now, today, from a position of overwhelming strength. The U.S. economy is literally twice as big and productive as the Soviet economy. The GNP of the NATO alliance is three times greater than the countries of the Warsaw Pact. The U.S. technology is superior in 14 of the most vital areas of military technology. The Soviet Union is ahead in none. Both superpowers have about the same number of strategic nuclear warheads which constitute the heart of the great deterrent to nuclear war. But three-quarters of the United States warheads are deployed in submarines and bombers while three-quarters of the Soviet deterrent is land based and stationary. What does this mean? It means the Soviet deterrent is far more vulnerable from the United States deterrent. As our most expert Sovietologist, Marshall C. Shulman, has told us, the Soviets are more ready to negotiate now than they have been for the past 40 years.

Can anyone doubt that the time to negotiate an end to the nuclear arms race is now? Mr. President, it's time the President gave his negotiators the signal to act on all fronts now. And, I mean now.

CORPS OF ENGINEERS WIN GOLDEN FLEECE

Mr. PROXMIRE. Mr. President, my Golden Fleece Award for September goes to the Army's Corps of Engineers for pigging out on foreign travel by increasing spending from $276,662 in fiscal year 1983 to at least $406,638 in fiscal year 1985, a fat 47-percent increase. Their total budget during this period actually got leaner, falling by 3 percent.

When the trough at home starts leaking, the corps casts its eyes overseas. But the taxpayer should not have to pay for the corps' sudden craving for stir-fried pork.

In fiscal year 1983, 275 corps eager beavers flew off to foreign lands. Of this number, 118—43 percent—stayed in this hemisphere; 91—33 percent—went to the Far East; and 54—20 percent—headed to Europe. Each trip by an individual lasted about 6 days and cost the taxpayer a little over $1,000 on the average.

By fiscal year 1985, the number of globe-hopping porkmeisters had increased to 413, a jump of 50 percent, even though their budget for work at home had fallen on hard times. Many traveled in this hemisphere, 196—47 percent—followed by trips to the exotic East, 142—34 percent—then by trips to Europe, 69—17 percent.

The corps is still digging around trying to find out how much it spent on foreign travel in fiscal year 1985. At first, it reported spending $513,437, but after catching some flak for the increase, it reduced its estimate to $406,638. Whatever the amount of the increase, it is too much.

That statement applies with extra force to the corps because economic development experts are thoroughly disenchanted with large-scale public works, the corps' forte. Far too many of these projects are conceived in hope but end in despair. The American taxpayer ends up paying for many of these flops in the form of foreign aid.

Talk about a double whammy. First, corps employees hop, skip, and jump around the world looking for new business. Then foreign countries hit on Uncle Sam to pay for their pork barrel projects. The taxpayers get it going and coming.

We should be hammering a tight lid on this pork barrel. The taxpayers have suffered more than enough from the corps' homegrown pork barrel. They should not have to pay for exporting it.

Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legisative clerk proceeded to call the roll.

□ 1140

Mr. STENNIS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. STENNIS. Mr. President, I ask for recognition.

The ACTING PRESIDENT pro tempore. The Senator from Mississippi.

DEFENSE AUTHORIZATION BILL FOR FISCAL YEAR 1987

Mr. STENNIS. Mr. President, I do not propose to present a long speech. But I have a few remarks to make concerning procedures on the question of completing and taking up the military authorization bill for the Department of Defense for the fiscal year which begins shortly.

Let me make clear, Mr. President, that I have no expressed or implied suggestions of holding back by those who are in charge of the bill on the House side or on this side, or any individual that is chairman of a committee or subcommittee. Nothing could be further from my mind than those subjects that I have mentioned.

But my concern is that the session now is almost down to its last days—and this is the largest single bill that we have had for the year, the largest sum of money that is carried in one bill. Even though the measure has passed the House of Representatives in one form and even though it has passed this body in another form, they have not been able to get the measure to a conference where those differences are always worked out, and a bill agreed on. And the final agreement is used, of course, as a basis for the appropriations that are made. Again this is the largest appropriation for the fiscal year for any purpose—the military Department of Defense appropriations bill.

As I emphasize, there is no fault or no blame to be attached here to any Member, or to the floor leaders. We have never had better ones in my time who are this good on utilizing the time that we have. But at the same time we cannot afford, as I see it, to fail to function on the large, important, and primary parts of the entire budget without giving every Member and even every person that might be interested a chance to find out just what is in the measure and the prime reasons by the different Members of either or both bodies as to why those provisions are thought to be necessary or why they are thought to be best.

I am concerned that the Department of Defense authorization bill for fiscal year 1987 is in serious danger of not being enacted into law as such.

That bill has been passed as I have said by both the House and the Senate, and is awaiting conference, but there are a great many controversial issues in the defense bill. And we are running out of time rapidly in this Congress. If the bill is not enacted, it will be a serious failure of the congressional system.

That is what we have to be more concerned about, Mr. President. We are not in an emergency now any more so than we have been in any preceding months and probably will be in succeeding months. We are gradually let-

ting our system suffer through misuse or nonuse, failing to carry out the highly important functions of our system in the way that we prescribed ourselves, that it shall be done in order to have the best chance to fully understand them by the Members, by the officials that are going to administer the law, and by the people that are going to pay the taxes to operate it.

The Defense authorization process began in 1959 with a simple amendment to require the annual authorization of the procurement of ships, aircraft, and missiles. Within a few years and during the 1960's and 1970's, the Defense authorization bill became the centerpiece of Congress' consideration of major defense problems. Major questions such as troops in Europe, the All-Volunteer Force, the Vietnam war, and strategic nuclear weapons were routinely debated and settled on this bill. But the coverage of this bill also has grown over the years adding research and development, manpower, and other items. Finally in 1982, Congress decided to require all appropriations for defense to be annually authorized. I am concerned that the DOD authorization bill has become overloaded and is carrying too much.

I am satisfied with this. I am in the position at least to make a judgment on that because of my continuous years of service here under the two systems. This measure has grown so much that it is absolutely necessary in my humble opinion that we follow these processes or something very near to them, and complete action on a separate defense authorization law standing on its own foundation.

The alternative, if we do not have this bill that has already been passed—to continue the further steps that are necessary to put it on the President's desk and get it made into law—is to put it on as a so-called floor amendment to a measure that is pending at that time which is strictly a temporary measure by its nature. We call it the continuing resolution. It may or may not have many other subject matters foreign to this purpose in the bill already.

It is unthinkable to me that we would let a measure as important as this bill just linger around, be pushed from pillar to post, and delayed and not acted on in the ordinary way, in a way that is not conducive to having a strong law with the sinews in it that will carry out the purposes as intended—a law in its own right, subject to the President's approval on its own merits rather than as a part of a bill with a great many other subjects, some of which were related and some not related, and without having the dignity, the power, and the strength that should go with a measure of this kind.

□ 1150

As I say, that procedure is just impossible, to me to imagine, that we could satisfy our own conscience, so to speak, by treating this type of legislation, this volume of legislation, in what I think is a careless and almost an indifferent way.

We must find a way, Mr. President, to settle the most important and urgent issues in connection with the DOD authorization bill and put off some of the other issues, if necessary, for other legislative vehicles. The committee system is the backbone of the work of Congress. The Defense authorization bill has provided a focus and forum, together with leverage on the military program and budget so that the committees and Congress can resolve some of the very difficult problems we face in this dangerous world. It provides a way to bring to bear the expertise of the Members, the staffs, the executive branch, and experts and professionals from around the country. It provides a benchmark that all Senators and Congressmen can rely upon to provide for expertise among our colleagues.

Certainly, our splendid staff members, and we have many of them, are not working under the most favorable circumstances when they have to become a part of a continuing resolution, that part being the contents of the authorization for a certain total fiscal year.

This year's bill, which is awaiting conference, represents a great deal of work by the Armed Services Committee. Both the House and Senate Armed Services Committee have devoted hundreds of hours of Members' time and thousands of hours of professional staff time to bring these two bills to where they are ready to go to conference. A way must be found, Mr. President, to salvage the best of that effort.

I do not speak lightly here, of course, about the importance of the work that has been done by the membership of these committees. I do not claim any credit for any that I have done. I have done very little. But Members have been in session day and night, day after day, weekends included, working on various aspects of this enormous bill.

Staff members have worked day and night all during the year, the 12-month period since we were at this stage last year. Work of this kind has gone on by these people who become experts, many of them, really worthwhile experts, in the field where they are engaged. They are the connecting link with the members of the committees and subcommittees who have many other duties. They are a connecting link with the Department, with the civilian employees of the Department of Defense, who are administering most of the contents of the bill.

I have said that there is nothing the matter with our system. We are proud of our system. We are celebrating the 200th anniversary of the continuous and unbroken administration of our Government under the terms and conditions of the Constitution of the United States.

We have reason to be proud of that fine record.

But we are being overcome now, and overtaken and overburdened by the bigness of this Government, the enormous size of these departments.

Of course, we all know there are great sums of money required to operate them. I am talking now about the operations from the standpoint of proficiency and efficiency and the standpoint of knowledge that goes into making of these laws, the final form of the laws, by the membership, what time they have left from the many other duties they have, and the continuous work of those who serve as members of our valuable staffs.

If we fail to produce a defense authorization bill this year, it would be a beginning of the pulling down of the committee system, which is Congress' principal means for dealing with the volume and complexities of problems we face today. That would be a tragedy. I believe the leadership, the membership, and the committees of both Houses of Congress should make every effort to bring forth a defense authorization bill and let it stand on its own strength and its own right.

I know it is necessary to reach that point that the Armed Services Committee should meet in conference as soon as possible. I am certainly not trying to tell them what they must do, but I am referring to the system that those of us who work in those departments respect, and, as a whole, we have carried out over the years. However, as this problem has grown and the size of this bill has grown, so has the contest for the division of time grown and the ability to keep up with it in a casual way can no longer be carried out. It has to be given a preference. It has to be given a time in order to reach its better attainments, its best form, and proceed then in the way I have already outlined where it would have a chance to become the best law possible.

They should attend to the major defense policies and weapons that are at issue and try to reach an agreement on the major military questions. If necessary, they should set aside some of the contentious issues that are important but tangential to the military questions. In the end, we all must work to preserve the process, and that means to bring out a conference report on the defense authorization bill for fiscal year 1987.

I do not want to mention blame. This is no attack on the people who

are involved in this enormous amount of work. That work has largely been done, and now we are talking about trying to finalize it and bring it to a conclusion in its best form, to give the President of the United States a chance to pass on it as he should have and must have, really, to be at his best, as to whether or not he will sign the bill rather than having to sign the substance of it in with a number of other matters in a continuing resolution.

□ 1200

It is unthinkable that we should let this happen, that we are not willing for it to be settled in any such way.

Mr. President, I know that sometimes a continuing resolution serves a good purpose. I remember when its use was started. I think I remember the first time it was ever used. It was just used then to take care of omissions of a relatively small kind and extent. It can be used in that way to profit. I am not trying to condemn it or make it illegal in any way; I am just saying that now, the times demand that these bills of such far-reaching consequences deserve and must have the very best time, the very best effort, the very best skills of all of us who are charged with any responsibility in connection with their enactment.

The people, by and large—the voters, the taxpayers—are entitled to have the very best judgment that we can give these troublesome questions here in searching for a solution and remedy. If we do not follow the general procedure that I have outlined here in what is the law, then we are not really doing our best.

I bring this to the attention of my colleagues in the rush of affairs here. I know what our leaders would like to do. I hope they try even harder and that every Member from both bodies cooperates fully and we find a way that all this major legislation will be given a reasonable time and therefore, our country and our people will have the best chance of getting the benefits of what is really the best we can do.

Mr. President, I yield the floor.

RECOGNITION OF SENATOR LEVIN

The PRESIDING OFFICER (Mr. DENTON). The Senator from Michigan is recognized.

TAX REFORM AND GRAMM-RUDMAN

Mr. LEVIN. Mr. President, I wish to continue my series of remarks on the tax reform conference report today by matching up two statements—one by President Reagan and one by Senator DOMENICI, the chairman of the Senate Budget Committee.

On December 12 of last year, when President Reagan signed the Gramm-Rudman Deficit Reduction Act, he said:

> With the passage of this landmark legislation * * * deficit reduction is no longer simply our hope and our goal—deficit reduction is now the law.

On September 11—just last Thursday—Senator DOMENICI said with respect to the possibility of meeting the Gramm-Rudman targets in 1988, "If we stay with the tax bill as it is * * * I don't think we can do it. It's an absolute impossibility."

Mr. President, the moment of truth will soon be here. Do we stand by our commitment of last year for deficit reduction, or do we pass the conference report on this tax reform bill this month at the risk of rocketing the deficit reduction goals of Gramm-Rudman into irrelevance?

We are forced to choose because the conference report—unlike the bill that passed the Senate—does not include the language of the Domenici-Gramm amendment. This amendment required that the tax reform bill's so-called revenue "windfall" in 1987 not be counted as reducing the deficit in that year, but rather be used as a partial offset to cushion the revenue shortfall which occurs in 1988 and 1989 as a result of this tax reform bill. The goal of the Domenici-Gramm amendment was to prevent Congress and the President from using the bill's temporary surplus in the first year in a way that would increase our deficit problems over the next 4 years. But once the Domenici-Gramm amendment was dropped in conference, it meant, in effect, that every year must stand on its own in the face of the erratic revenue flows which result from this tax reform bill. The consequence in 1988, for example, is that even without deviating $1 from the spending plans envisioned in the budget resolution the Congress adopted less than 3 months ago, we are $17 billion further away from meeting the Gramm-Rudman targets for that year.

The conflict between Gramm-Rudman and the tax reform conference report is unfortunate for two reasons. First, in principle, tax reform and Gramm-Rudman should be allies and not antagonists. Closing tax loopholes and a toughened minimum tax on profitable corporations and wealthy individuals who are not paying anything in taxes could provide the revenue component of a comprehensive and credible deficit reduction package. Instead, the pending tax reform bill soaks up this revenue to fund uneven tax cuts.

Partial reliance on revenues to meet the Gramm-Rudman targets would mean that those targets could be met without the unacceptable large program cuts which would result from relying exclusively on those cuts to achieve the required level of deficit reduction. Using the revenues from loophole closing and a toughened minimum tax would also allow us to avoid resorting to regressive tax increases, such as increases in telephone excise taxes and the like, for the revenue component of a deficit reduction package. And such a package of spending cuts and revenue increases would permit us, as the authors of Gramm-Rudman intended from the beginning, to meet those targets without the ax of across-the-board cuts falling.

The second reason why the conflict between the tax reform conference report and Gramm-Rudman is unfortunate is that it sets the stage for the triumph of a special interest against a public interest. But, it is becoming increasingly apparent that the primary support for this bill is in Washington, the home of the special interests, and not in the heartland.

By the way, I do not know of one interest group that has formally come out opposed to the conference report. As a matter of fact, when the Senate version was on the floor, the chairman of the Finance Committee made a point of how it was formally supported by over 700 organizations.

In a very real way, the many, many months of work put in by some Members of Congress and by the administration in developing this bill have given them an understandable, but, nevertheless, special interest in seeing it enacted into law. This determination is by no means a product of evil intentions but of human nature.

The public's primary interest, however, is not in seeking this particular tax reform bill enacted, even though it is clear that the public would like to see some kind of tax reform. Rather, the public's primary interest is in seeing us take substantial steps to reduce the deficit. We reflected the public's interest when the Senate voted in April by a margin of 72 to 24 in support of a resolution calling for an agreement on deficit reduction before considering tax reform. Over the ensuing few months, however, the order of priorities within the Senate has been reversed. We are now on the verge of passing a tax reform bill while we are still scrambling for ways to meet the Gramm-Rudman deficit targets in 1987 and while many are dreading the budgetary implications for 1988.

Several months ago, when the Secretary of the Treasury James Baker was asked whether the President's pursuit of tax reform legislation meant that deficit reduction was on the back burner, he denied it by saying that every stove has two front burners. But when we look at the conference report on the tax reform bill, it is clear that this stove only has one front burner. And it is not only warming up tax

reform—it is also cooking our budgetary goose as well.

□ 1210

ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of routine morning business, with statements therein limited to 5 minutes each.

HEMOPHILIA CENTERS

Mr. DECONCINI. Mr. President, I would like to bring to the attention of my colleagues the success of the Hemophilia Diagnostic and Treatment Centers Program, which provides comprehensive diagnosis and treatment for hemophiliacs in 22 federally funded regional centers throughout the United States. In the first 10 years of the program—1975-85—and as a direct result of its prevention orientation, average hospital admissions for hemophilia patients served by these centers were reduced 88 percent, overall costs of medical care were reduced 74 percent, and unemployment was reduced 74 percent. The National Hemophilia Foundation estimates that $1.9 billion in medical care costs have been saved because of this program.

The two treatment centers in Arizona—the Mountain States Regional Hemophilia Center at the University of Arizona Health Science Center and its affiliate at St. Joseph's Hospital/Medical Center—have treated 236 patients. The Arizona Hemophilia Association, through these two centers, has developed an impressive program of comprehensive care. Its array of services, in addition to physical care, includes psychological assessment, continuing education, and counseling to enhance family support. Taking an interdisciplinary approach, the association has brought the medical, financial, and psycho-social ramifications of this disease into full focus, while underscoring the long-term benefits of early intervention. The association has also served an important function in educating the public about the needs of hemophiliac patients. In short, the Arizona program provides high-quality and comprehensive care in a manner which has resulted in significant cost savings. This program can serve as a model for treatment of other chronic diseases. By focusing Federal funds on comprehensive early intervention with an emphasis on home care, the end result can be both significant cost savings and, more importantly, better care and an enhanced quality of life for patients.

I applaud the program and all the individuals who have worked so diligently to make it a success.

THE DEFICIT DILEMMA

Mr. CHILES. Mr. President, we have less than a month before Congress adjourns for the fall elections.

And in that time, we've got to resolve a huge economic problem. Right now the economy is a leaning tower straddling a fault line. Within 1 week's time the stock market dropped 127 points. It dropped over 86 points on September 11 alone.

The markets are worried about the economy. They're worried about the possibility of higher interest rates. They're worried about our ever-growing international trade deficit.

And they have doubts whether the administration and Congress are serious about reducing the deficit.

Well, Mr. President, I'm worried, too. I'm afraid we're in the same situation as the family on a Sunday morning who gets a call that unexpected guests are on their way. They don't have time to clean up the mess, so they sweep it under the rug, stuff it in the closet, put it behind the couch. The mess is still there, but it's been rearranged to make it look like your house is in order.

It seem to me there's a growing temptation in Washington to do the same things now, just before the elections. Hide the problems. Put them aside.

Mr. President, it just won't work. Less than 1 year ago, we enacted the Gramm-Rudman-Hollings law. It was a promise that this year, we'd get the deficit down to $144 billion. Next year, we'd get it down to $108 billion. And over the course of the 3 years that follow, we're supposed to get the deficit down to zero.

But last Thursday, Members from the House and Senate met as the Temporary Joint Committee on Deficit Reduction, authorized under the Gramm-Rudman-Hollings law. And the reason we met was to act on the sequester report put together for us by the Congressional Budget Office and the Office of Management and Budget.

The fact that we met at all—the fact that we had to activate this backup procedure—shows we have some serious problems.

We had to report a sequester because our efforts to reach this year's deficit target have already fallen short. We passed a budget resolution in the sping that was supposed to get us down to the target, and we've found out now it wasn't enough. What we're up against is the special provision in the law that says, if we miss the target and if we can't agree on measures to reach our goal, we'll have to vote on a package of legislative changes that will whack away sums of money according to a percentage formula.

Originally, that procedure was to have been automatic but the Supreme Court struck down the automatic procedure, so now we might have to vote on those cuts ourselves. And if we vote not to make those cuts, we go home to this year's election with a deficit of somewhere over $170 billion.

It seems to me what we have to do is take the advise of an old Florida farmer. That farmer used to tell visitors, "if you want anything and can't find it, just come to me and I'll tell you how to get along without it."

I wish that farmer was here right now, because that's a lesson we'll have to master in a hurry. We'll have to get along without a lot of things to avoid a sequester and meet the deficit target.

At our hearing last week, we heard from the Director of the Office of Management and Budget, Jim Miller. And we heard from Rudy Penner, the head of the Congressional Budget Office. The committee membership asked them about their deficit estimates.

Now, keeping in mind that our target for this year is $144 billion, the Office of Management and Budget projected a deficit of $156.2 billion. The Congressional Budget Office put the deficit at $170 billion. That averages out to $163.4 billion.

If OMB turns out to be correct, we'd have to cut a little over $12 billion more to reach the target. If the average projection is correct, we'd have to cut a little over $19 billion. And if CBO is right and the deficit is $170.6 billion, then we've got to cut roughly $27 billion.

Now I know some will ask if the problem's really as bad as that. Some will point to the $10 billion cushion under Gramm-Rudman-Hollings. It provides that if we come within $10 billion of the $144 billion deficit target, that's close enough, and we can avoid a sequester.

Well, for one thing, if we miss by $10 billion this year, and then miss by $10 billion in each of the next 4 years we end up $50 billion short of our goal. It's like spotting the opposition a touchdown and a field goal then multiplying it by a billion and still think you can win.

That's not much of a game plan, Mr. President. But let me remind this body of something else. Let me start with the tax bill.

A lot of people say, well, we're going to get somewhere between $9 and $11 billion in surplus revenues from the tax reform bill this year. That should just about wipe out the deficit excess this year. So let's take that money and we won't have to worry about the deficit target.

Alright. Fine. But if we do that, we exhaust the entire supply of gimmicks. And the reason is that while we get a windfall from the tax bill, this year, we end up with a shortfall next year or about $22 billion. That's a swing of $30 billion that has to be made up from other spending cuts or tax in-

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creases. So once you start robbing Peter to pay Paul you end up playing the tax bill against the deficit, and the deficit's going to win.

OK. Now are there any other problems? Yes, there are. The House has passed a drug bill, and that will add more than a billion dollars to the deficit.

We're also removing the Social Security trigger threshold this year, and that's going to add about another billion dollars to the deficit. We'll be spending more for a new space shuttle. And, when you add roughly $2 billion more because of Appropriations Committees actions, the deficit becomes $175 billion.

Could we solve the problem with additional revenues? Yes. In fact, on September 4, Congressman ROSTENKOWSKI spoke of an eventual need to raise the revenues to pay for these programs. But when Budget Director Miller appeared before the temporary Joint Committee on Deficit Reduction last week, Senator DOMENICI asked him if the administration could reach the Gramm-Rudman-Hollings deficit targets in fiscal year 1988, he answered yes. And when Mr. Miller asked whether it could be done without revenues, he said "yes, with difficulty."

Mr. President, I think Mr. Miller is in a distinct minority. But unless we come up with a king's ransom of additional budget cuts, we're going to have a sequester in 1988 because there's no way the administration will approve raising the revenues to pay for the spending it's endorsed.

What happens when you face a sequester? Congressman RUSSO made that point to Mr. Miller. He told Mr. Miller that a sequester would be evenly split between defense and domestic spending.

And what happens if we run into a sequester and Congress won't pass it or the President won't sign it? You get a deficit in excess of $170 billion this year.

So what I'm asking is this. Let's work together to cut the deficit as we promised to do under Gramm-Rudman-Hollings. Let's not use any tricks. Let's not rely on a revenue windfall that becomes a revenue shortfall next year. Let's not overlook the fact that we'll be spending money for the drug war and Social Security that will make the deficit higher.

What I'm asking for here is clear and honest estimates of the problem and tough and quick action on the deficit. The election may be on everyone's mind. But the deficit is on everybody's backs. And the monkey is on ours.

Mr. President, I ask unanimous consent to insert in the RECORD some excerpts from the hearing of the temporary Joint Committee on Deficit Reduction held September 11, 1986.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

FISCAL YEAR 1987 DEFICITS FOR GRAMM-RUDMAN-HOLLINGS

	CBO	OMB/CBO average
Estimate	170.6	163.4
Adjustments:		
COLA's: Repeal trigger	.8	.4
Advanced farm deficiency payments	0	2.2
Pay-Military/civilian	0	1.4
Appropriated entitlements	0	.9
Appropriations Committee action	1.7	1.7
Shuttle	.2	.2
Reestimate	173.3	170.2
Reconciliation (current Senate)	−3.7	−3.4
Conrail sale	−2	−2
Revised estimate	167.6	164.8
Further savings to avoid a sequester (153.9)	13.7	10.9

Prepared by. Senate Budget Committee minority staff, Sept. 12, 1986.

EXCERPTS FROM A HEARING OF THE TEMPORARY JOINT COMMITTEE ON DEFICIT REDUCTION, SEPTEMBER 11, 1986

DR. RUDOLPH PENNER, DIRECTOR, CONGRESSIONAL BUDGET OFFICE

A large part of the budget is neither exempt from sequestration or is unaffected by it. As a consequence, the reductions are concentrated in about 40 percent of total outlays. To get 19.4 billion in outlay reductions, and even larger amount in new budget authority and other spending authority has to be sequestered. For example, defense spending authority would have to be reduced by 19.1 billion in order to get outlay savings of 9.5 billion. This calculation indicates that a sequestration would reduce spending for a number of years following 1987.

An '87 sequestration of 5.6 percent for defense and 7.6 percent for nondefense programs would be much more severe than these percentages imply. First, these reductions would be on top of the '86 sequestrations. Second, the reduction in real terms would be even greater because of the loss of any adjustment for inflation in 1987. The combined effect suggests reduction from the original '86 appropriation levels of close to 13 percent for defense spending—defense programs in real terms, and 14 percent for nondefense.

EXCHANGE BETWEEN SENATOR PETE DOMENICI, CHAIRMAN OF THE SENATE BUDGET COMMITTEE AND JAMES C. MILLER, III, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Chairman DOMENICI. I will withhold on questions on my side—well, no, I will not.

Let me ask one. Somebody get five minutes up here.

Mr. Miller, with reference to the tax bill that is pending in conference, have you received some preliminary estimates as to the effect of the tax bill on the 1987 revenue base?

Dr. MILLER. Yes, I have.

Chairman DOMENICI. And with reference to the current estimates of that bill, are you aware of the '88 and '89 estimates on the impact revenue?

Dr. MILLER. Yes.

Chairman DOMENICI. Is it fair to say that the current estimate is that there will be an $11 billion revenue add-on or windfall, so to speak, in '87?

Dr. MILLER. Yes.

Chairman DOMENICI. To be followed by an '88 and '89 revenue shortfall that currently is estimated at about $22 billion per year, is that correct?

Dr. MILLER. Yes.

Chairman DOMENICI. Mr. Miller, I assume that at this late date—this early date, you are nonetheless busy at work on the 1988 budget which you will submit on behalf of the President to the Congress and the people of the United States early next year?

Dr. MILLER. Yes.

Chairman DOMENICI. Might I ask if you at any time in working on that budget assumed that you could meet the Gramm-Rudman-Hollings total for 1988 with $22 billion reduction in the tax base of this country off the current baselines?

Dr. MILLER. With difficulty. With difficulty. [Laughter.]

Chairman DOMENICI. I interpret that in preparing the budget to meet the Gramm-Rudman total of 106 billion for 1988, that you have not yet come up with even a preliminary approach which would reach that if we had $22 billion less in revenues than we presently contemplate? Is that a fair statement of your answer "with difficulty"?

Dr. MILLER. Yes.

Chairman DOMENICI. Might I ask one additional question?

Might I ask whether you expect us to reach the Gramm-Rudman-Hollings' targets of 1988 if that tax bill becomes law?

Dr. MILLER. Yes.

Chairman DOMENICI. Might I ask do you intend us to do that without any new revenues?

Dr. MILLER. Yes.

Chairman DOMENICI. Might I ask you how in the world you intend to do that? [Laughter.]

Dr. MILLER. With difficulty. [Laughter.]

BUDGET DIRECTOR JAMES C. MILLER III

I do not think at this time we should depend on an $11 billion bump from tax reform as saving us from a sequester. As I indicated earlier, well, we have got to have the $9.4 billion off the Gradison baseline to get within the $154 billion margin of error. And I think we can accomplish that. But we should not depend. We should do it through a reconcilation process, not depend on the bump.

EXCHANGE BETWEEN SENATOR CHILES AND DR. RUDOLPH PENNER, DIRECTOR OF THE CONGRESSIONAL BUDGET OFFICE

Senator CHILES. The Blue Chips consensus economic forecast for September has just been released. Based on predictions of 52 private forecasters, I think it is interesting to compare what these forecasters are saying with what CBO and OMB are telling us.

We have gotten used to OMB telling us that things are going to be good, just around the corner. Now they are telling us we can expect 3.7 percent growth in fiscal year 1987. CBO is not that optimistic at 3.2 percent, and GAO, in releasing its review, is telling us that CBO is too optimistic and should expect the economy to grow at only 2.8. Now, we see the Blue Chips consensus is telling us that GAO is too optimistic, that the private consensus sees a 2.7 percent growth. So the consensus is a full percentage point below OMB, and when you look at where the OMB forecast fits in with the private forecasters, we find out of the 52 forecasters only five believe the economy is going to grow as fast as OMB sas.

That means that 90 percent of the forecasters think that OMB is wrong, and even CBO is optimistic with 60 percent of the private forecasters.

So it is important that we understand, that the OMB/CBO average forecast is a far cry from the true average as reflected in the Blue Chip consensus.

The true average would reflect the views of both the optimistic and pessimistic forecasters.

Basically, Dr. Penner, if the consensus is correct and we grow .7 percent slower than CBO says, how much larger would the 1987 deficit be?

Dr. PENNER. Well, first let me make the point, Senator, that while our friends at GAO were quite kind to us in the January report with regard to our forecasting record, which stands up pretty well compared to private forecasters, nevertheless, it is such an uncertain business, that our average forecast error for the summer forecast for the following calendar year, for real growth, during the history of CBO, is slightly more than one percentage point. So neither the OMB nor the GAO forecast, nor the consensus forecast can be said to be really significantly different from ours. But taking you very literally, and assuming that all else, interest rates, and et cetera remain the same, a one percentage point reduction error on our part in the real growth estimate for 1987 would lead to an $8 billion error in the deficit estimate.

A drop of .7 percentage points; therefore it would be about 6 billion. Extrapolating that to 1988, a .7 percent carried through, it would be worth——

Chairman DOMENICI. Could I interrupt?

Dr. PENNER [continuing]. 16 billion.

Senator DANFORTH. I believe that the enactment of the Tax Bill necessarily renders Gramm-Rudman-Hollings as "dead duck" after the 1987 fiscal year.

The reason I believe that is that for 1987, we will not end up with sequestration. We will end up hitting a target not of $144 billion, but, $154 billion, and we will use to meet that enlarged target a projected first-year revenue windfall from the Tax Bill of $11 billion * * *.

So the comment that I would make is this: I believe that between the regular, what we have agreed to, reduction in the deficit between 1987 and 1988, and the fact that we are using, will be using a front-end load from the Tax Bill, whereas, there will be a shortfall in the following years; plus what we know is clear funny money in the Tax Bill; plus the economic consequences of repealing the Investment Tax Credit, taking more money out of depreciation, and other changes, the effect that that will have on economic projects—I think that it is a matter of certainty, that Gramm-Rudman-Hollings is a one-year phenomenon, and that it will be of no value at all.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES

Mr. BOWSHER. I would like to comment just a little bit on the expenditure side, too, because I share Senator Danforth's concern, and one of the concerns we put in our GAO report was, that as you push these expenditures into the next fiscal year, that might help for it to make this target. But both in the defense area, and the agriculture area, and things like that, what you are doing is, you are building up a bigger and bigger problem for the succeeding years.

JAMES C. MILLER, III, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Dr. MILLER. Let me say of course we have got to get ten—excuse me—$9.4 billion to get within the 154 margin of error. So that is the total that we have to have. Our position is yes, we cannot accept any further reductions in the defense and international affairs budget.

In other words, we have to have what is in the mid session review, is what has come in under the Congressional Budget Resolution, which is a substantial cut, as you know, in defense and international affairs.

The President cannot accept anything less than that, and so we have—and the President has been adamant against any increase in taxes.

SENATOR PETE DOMENICI, CHAIRMAN, SENATE BUDGET COMMITTEE

Yes, we will try to reduce the deficit with the reconciliation bill. I don't believe that there is any way to find what's necessary in the reconciliation bill. I have ten or twelve ideas. I've talked to the administration about theirs; I've searched around with everybody that has them. Let me suggest, I don't think they're there.

And in addition, there too, most of them are one shot events. Everybody is joyous that we're going to sell Conrail, maybe. We don't get any impact in 1988 and 1989 from those kind of events, and we're right back in the muddle.

My prediction is that with the passage of the tax bill as is, with deficit reduction as pushed on us by Gramm-Rudman-Hollings, and the way we will comply, that it will become common, ordinary knowledge by January, February, March of next year that we cannot reach the totals prescribed by Gramm-Rudman-Hollings.

But I think we're getting very close, very close to abandoning a notion of truly ever getting to a balanced budget, and I believe we're going to end up very close to abandoning the notion that we'll be on that path, as prescribed by that law.

Nonetheless, it's serving a good purpose. This year it will force us to do some things that we wouldn't otherwise do—frankly not an awful lot. It's just forced us not to spend some things. But in terms of reductions that are permanent in nature—I mean, what have we done? We have passed nothing. That's why the deficit is lower.

If we do the tax bill as is, if we intend to stay with Gramm-Rudman-Hollings, I just don't believe we can do it. Now, everybody can decide what that means, and you apparently have decided there's another policy that you think is very good, tax reform bill, that it's necessary. No criticism from my side. The time has come when you have to do something. Just don't have any doubt about it—it's not going to make Gramm-Rudman-Hollings miraculously get us down to 108 billion and a balanced budget three years thereafter. I mean, it just can't. It's an absolute impossibility.

SANCTIONS AGAINST SOUTH AFRICA—SENATE BILL DOES NOT PREEMPT STATE AND LOCAL ACTION

Mr. KENNEDY. Mr. President, in recent days, a question has arisen as to whether the Anti-Apartheid Act of 1986 adopted last month by the Senate might have the effect of preempting State and local action against apartheid.

In my view, it would have no such effect, and the lack of any such effect is strengthened by the overwhelming vote in the House of Representatives last Friday in passing the Senate bill while simultaneously adopting House Resolution 549 expressing the explicit intent of the House against preemption.

Indeed, it was with some surprise that the possibility of preemption is being pressed at all, because the case for preemption is so tenuous. True, Senator LUGAR, in opposing the D'Amato amendment, expressed his view that State and local antiapartheid laws would be preempted. But he cited no language in the statute to justify that view, and the view is contrary to the premise of the D'Amato amendment, which was designed to mitigate the effect of State and local antiapartheid laws on contracts involving Federal aid.

The D'Amato amendment was defeated, but a revised fall back amendment was immediately accepted deferring Federal penalties on such contracts for 90 days, so that State and local governments could modify their antiapartheid laws if they chose to do so.

Obviously, if Senator LUGAR's argument were correct that the Senate bill preempted State and local antiapartheid laws, there would have been no need for either the original or the revised D'Amato amendment, since the State and local laws would be invalid anyway.

Further, the preemption issue must, of course, also be analyzed in terms of the Senate debate last year on the Anti-Apartheid Act of 1985. The issue was clearly raised in an amendment—circulated by Senators ROTH but never called up for debate—that would have added specific language requiring preemption to the 1985 Senate bill. In the end, after extensive lobbying against the amendment, the proponents of preemption chose not to raise their amendment in the face of certain defeat; and the legislative history at the time of passage was clear that the bill as adopted by the Senate would not preempt State and local laws.

Four days after Senate passage, Senator LUGAR and McCONNELL engaged in a colloquy attempting to salvage their position by arguing that the bill, even without the Roth amendment, would still preempt State and local laws; but it is unlikely that any court would take this argument seriously in the face of the strong legislative history to the contrary and the decision of the advocates of preemption not to press the Roth amendment.

Curiously, in the 1986 South Africa debate, Senator LUGAR chose not to raise the preemption issue again until the last day of Senate floor debate, at a time when the unanimous-consent agreement governing debate on the bill prevented any further amendments from being raised.

In light of this sudden 11th hour claim of preemption, I asked Prof.

Laurence Tribe of Harvard Law School, one of the most distinguished and respected constitutional scholars in the Nation, to analyze the issue. I have received Professor Tribe's analysis today and his conclusion is clear:

The Anti-Apartheid Act would *not* preempt state and local measures to divest holdings in South Africa or to limit dealings with companies doing business there. (Emphasis in original)

Mr. President, I ask unanimous consent that a letter from Professor Tribe and his accompanying memorandum may be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

SEPTEMBER 15, 1986.

Hon. EDWARD M. KENNEDY,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR KENNEDY: As you requested, I have studied the Comprehensive Anti-Apartheid Act of 1986, as first passed by the Senate this August and then by the House this September, to determine whether this federal legislation would preempt state and local efforts to sever economic links to the South Africa regime. Particularly in light of statements favoring preemption by Senator Lugar and a few others, I appreciate the importance of carefully assessing this issue so that the debate on whether to override the anticipated veto of the measure is as fully informed as possible. For the reasons set forth in the accompanying memorandum, I have concluded that the Anti-Apartheid Act would not preempt state and local measures to divest holdings in South Africa or to limit dealings with companies doing business there.

The provisions of the Anti-Apartheid Act bind states and localities every bit as much as they bind private companies; like private companies, state and local governments are forbidden by the 1986 Act to import South African uranium or krugerrands, for example, and are forbidden to make new direct investments in South Africa. But nothing in the Act purports to place a ceiling on the range of further steps private institutions might take to express their disapproval of apartheid or their lack of confidence in the political and economic future of the regime currently in power in South Africa. Thus, even though the Act does not require any private body to divest its portfolio of existing holdings in South Africa, it leaves private bodies—such as colleges and universities, for example—completely free to divest. Public universities and other public entities, whether linked to municipal governments or to state governments, are left equally free, in their proprietary role as market investors and market participants, to reduce their dependence upon, or their complicity with, the apartheid regime.

A decision by Congress to saddle states and localities, acting in such proprietary capacities, with unique limits on their freedom is, of course, conceivable. But such a decision would be most unusual and would pose a host of problems that no court would likely assume Congress was eager to create. Among other things, legislation leaving state and local bodies less free to divest than private bodies are would place courts in an extraordinarily difficult and delicate position, requiring them to discharge a number of tasks hard to square with a suitably limited conception of federal judicial authority.

As the accompanying memorandum explains, only the clearest evidence that Congress in fact intended such unusual results could persuade the courts, under existing preemption standards, that states and cities had lost, by virtue of the recently enacted legislation, a freedom of choice that they had previously enjoyed and that private actors continue to enjoy under the 1986 Act. The text, structure, and legislative history of the Act completely fail to provide such evidence. It follows that state and local laws and policies that complement the anti-apartheid thrust of the new federal law, far from being preempted by it, would be welcomed by courts, and should be welcomed by lawmakers, as helping to carry forward the purposes of this landmark statute.

Sincerely yours,

LAURENCE H. TRIBE,
Tyler Professor of Constitutional Law, Harvard Law School.

MEMORANDUM ON THE NONPREEMPTIVE EFFECT OF THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986 UPON STATE AND LOCAL MEASURES

From: Laurence H. Tribe.
To: Concerned Members of the House and the Senate.
Date: September 15, 1986.

On September 12, 1986, the House of Representatives passed a measure already approved by the Senate establishing a broad regime of sanctions against South Africa. The question addressed in this memorandum is whether this legislation might to some degree preempt state or local legislation. This memorandum concludes that the federal statute would have no such preemptive effect.

I. THE DIVERSITY OF STATE AND LOCAL ANTI-APARTHEID MEASURES

Spurred by events in South Africa, states and cities have taken a broad range of steps to limit their economic links to that country. These actions take a wide variety of forms; the most common practices are divestment of public ownership of shares in corporations directly operating in South Africa, and "selective purchase ordinances" restricting city contracts with companies operating there. See N.Y. Times, Sept. 9, 1986, at A1, col. 5.

Restrictions on investments may take the form used by Maryland, which imposed a moratorium on investment of state funds in companies that do not receive the highest ratings of the Sullivan Principles. See id. Or these restrictions may go further, and require the sale of state or local investments currently held by state or municipal entities in any such company. See, e.g., Conn. Gen. Stat. Ann. § 3-13(f) (West Supp. 1986).

These restrictions may go further still, and require divestment of all holdings by state or local public universities or other bodies in any company operating in South Africa. See, e.g., D.C. Code Ann. § 47-342 (Supp. 1986). Last month, for example, California passed a measure requiring the sale over the next four years of more than $11 billion in state securities in companies doing business in South Africa. See N.Y. Times, Sept. 9, 1986, at D5, col. 2. New Jersey's decision to sell its holdings of $3.5 billion was the largest previous divestment program undertaken by a state. See N.Y. Times, July 21, 1986, at A5, col. 2.

Restrictions on investments also vary in their generality; most are directed specifically at South Africa, but some bar public investments in any company that "condones through its actions discrimination on the basis of race." E.g., Wisc. Stat. Ann. § 36.29(1) (West Supp. 1985) (regulating investment of university funds).

At least thirty cities, mostly within the last year, have passed laws to curtail the awarding of public contracts to corporations operating in South Africa. These bidding preferences may allow such awards if other bids are at substantially higher prices—e.g., eight percent (as in Chicago), six percent (as in Washington), or five percent (as in New York City). Or they may ban the purchase by city agencies of goods and services from such companies altogether, except where accepting the lowest bid is required (as Los Angeles stipulates), or unless the company can demonstrate that it does not discriminate or that its products are essential or unavailable elsewhere (as Maryland stipulates). See N.Y. Times, Sept. 9, 1986, at D5, col. 5.

Finally, the motivations for such steps are as diverse as the various measures themselves. Some states have promulgated statutes in order to break ties with a regime they detest. Others have passed laws to conform with their overall investment or educational policies. See, e.g., Conn. Gen. Stat. Ann. § 3-13(d)(a) (West Supp. 1986). In some instances, general civil rights statutes have been interpreted to require divestment from South Africa. See Op. Atty. Gen. Wisconsin (Jan. 31, 1978). Of course, even cities and states that pass no formal divestment measures are likely to take account of the situation in South Africa in deciding upon routine issues, including what equipment to purchase or what funds are the most prudent in which to invest. Such decisions are made by a myriad of officials at all levels of government and bureaucracy. And all will share the difficulty of determining the degree to which they were based on a straightforward rationale of economic prudence. For whatever one's moral perspective on the South African regime, no prudent investor could fail to see the economic implications of investing in a country undergoing a profound political and social upheaval.

II. THE RELEVANT CONSTITUTIONAL FRAMEWORK

Although the setting of the foreign policy of the United States is an exclusively federal prerogative under the Constitution and cannot be usurped by state or local bodies with or without the consent of the U.S. Department of State, see *Zschernig* v. *Miller*, 389 U.S. 429, 436 (1968), it is equally fundamental that states and their public subdivisions are assigned the responsibility, under our Constitution, of deciding where and how to invest the public resources they collect through taxing and other sovereign measures. The Congress, in which the sovereign interests of states and localities are represented, see *Garcia* v. *San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005, 1018 (1985), may choose to displace this historically localized responsibility by entrusting some suitable federal authority with control over the economic choices of state or local bodies. But absent such a congressional choice, there is nothing in federal constitutional law that could conceivably support taking from state legislatures and municipal authorities this basic control over their own economic destinies.

It is, of course, true that an Act of Congress dealing with the relations of the United States with a particular nation—in this instance, South Africa—might serve to limit the options open to states or localities.

To the extent that federal legislation has this effect, the Supremacy Clause of Article VI renders contrary state or local choices null and void. But no court could find the requisite preemptive effect in a Congressional measure that is ambiguous on this score. As the Supreme Court has repeatedly held, there must be compelling evidence of preemptive intent by Congress before courts may "infer that Congress has deprived the States of the power to act," see *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959), in any area that, like local taxing or spending, see *San Antonio School Dist.* v. *Rodriquez*, 411 U.S. 1, 40-55, (1973), is infused with "deeply rooted . . . local feeling and responsibility," Garmon, 359 U.S. at 244; see *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983). There is, in other words, a strong presumption against finding federal preemption by mere implication—absent, of course, a direct conflict or contradiction between the federal statutory mandate and a particular state or local measure. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The presumption against preemption operates fully in the context of state and local divestment decisions, whether those give effect to a polity's sense of how to deploy its public funds most prudently or to its convictions as to the moral obligations that compel it to avoid association with a repugnant regime. Nothing in the legislation passed by the Senate on August 15, 1986, and approved by the House on September 12, 1986, conflicts with the sorts of state and local divestment measures sketched in the introductory portion of this memorandum, and nothing in the recently enacted federal legislation evinces a decision by Congress to oust states and localities altogether from this area.

III. THE TEXT AND HISTORY OF THE FEDERAL STATUTE

State and local divestment measures of the sort thus far enacted would neither interfere with the national conduct of our foreign policy nor conflict with the operation of the recently enacted statute. The federal statute includes an array of complex limitations, and any state or local law that conflicts directly with these limitations of course would be preempted, but nothing in the measures described above in Part I of this memorandum would create such a conflict.

Courts will find preemption premised on "actual conflict" only when it is difficult for a party to comply fully with both local and federal laws. See *Pacific Gas & Electric* v. *Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983); *Jones* v. *Roth Packing Co.*, 430 U.S. 519, 532 (1977). Further, courts will not infer preemption based on speculative conflict; the conflict must be real and actual. See *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 131 (1978); *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446 (1960).

The statute at issue here poses no such conflict. The Act lists measures by the United States to undermine apartheid, including numerous specific restrictions that would apply to the actions of private parties. These include prohibitions on the importation of krugerrands, see H.R. 4868, 99th Cong., 2d Sess. § 301 (1986), on the importation of uranium or coal from South Africa, see id § 309, and on new investment in South Africa, see id § 310. But the statute includes no explicit prohibitions that apply to states or local governments as such. If the alleged preemptive effect of the federal statute would reach all state and local actions taken in whole or in part to impose pressure upon, or express disapproval of, South Africa, this effect would have to encompass decisions to accelerate the rate at which they sell interests in assets related to South Africa under a preexisting divestment program, or decisions to purchase goods or services from one company rather than another based partly on each company's ties to South Africa.

Yet the new legislation regulates the states and cities in their capacities as "market participants" only in the same way that private parties are regulated. For example, a state could not invest directly in South Africa or import South African uranium or krugerrands without violating sections 310, 309, or 301, respectively. But as market participants, states and cities are left just as free to disassociate themselves still more from the South Africa regime as private parties are. Compare *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980) (according greater freedom to states as "market participants" than as regulators of private actors); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (same).

The only conceivable argument for preemption would follow if the statute were construed as setting a ceiling on the permissible means of divesting economic assets related to South Africa. But this the statute does not do, not for private parties, nor for state and local governments; the statute draws no distinction between state and local governments as market participants, on the one hand, and private parties on the other. In this regard, it would be highly unusual for Congress to impose greater restrictions on state and local public actors than it imposes on private actors. Particularly in light of the proprietary actions at issue, such a public-private distinction would pose difficult problems for the courts in identifying "state actors." Although courts deal with such questions in constitutional cases, it would be unusual for Congress throw such a question to the courts through statutory preemption.

The federal statute has no provision preempting local legislation. The preamble simply states that the Act's purpose is "to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa;" this language merely indicates congressional intent to coordinate foreign policy among the branches and agencies of the federal government. See H.R. 4868, 99th Cong., 2d Sess. § 4 (1986). All of the provisions dealing with government procurement and investment decisions refer specifically to the "United States Government." See id. §§ 314, 316. This silence regarding the states and cities reveals an intent not to preempt state and local action.

The legislative history of anti-apartheid bills before Congress buttresses this inference. Senator Granston explained in 1985 discussing anti-apartheid legislation then pending, "[W]e have no such intention [to preempt local legislation] in this bill otherwise the Senate would have put a preemption provision in the bill." Cong. Rec. S9388 (July 11, 1985). As Senator Moynihan asserted regarding the legislation this year, "States and localities should have the right to make their own decisions regarding their own individual involvement with the South African regime." Cong. Rec. S9306 (July 17, 1986). The House vote of September 12, 1986, expressly endorsed this non-preemption view.

Senator Lugar, to be sure, expressed a different view of the matter. See Cong. Rec. S11,817 (Aug. 15, 1986) (comments of Sen. Lugar). But Senator Lugar, by himself or by citing isolated comments from the floor, should not be able to deter states from deciding how to invest or spend their own funds. If a few legislators could insert calculated snippets of legislative history and thereby instruct the courts to regulate the finances of states and cities, they could circumvent the need to articulate that scheme of regulation through the usual legislative process. Such a result would violate the spirit of Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), which struck down the legislative veto as a circumvention of the bicameralism and presentment requirements. Chadha noted that the Constitution had set forth "a single, finely wrought and exhaustively considered, procedure," id. at 951, to ensure "that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials," id. at 949. The legislative history of the bill at hand reveals nothing resembling full legislative consideration and adoption of a preemptive federal scheme.

The only section of the statute dealing with state and local anti-apartheid laws is section 606 added by Senator D'Amato. See Cong. Rec. S11,818 (Aug. 15, 1986). This section states: "(1) no reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and (2) no other penalty may be imposed by the Federal Government, by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after the date of enactment of this Act." H.R. 4868, 99th Cong., 2d Sess. § 606 (1986). This provision implies that after ninety days, states and localities could be prevented from following their anti-apartheid policies in procurements using federal funds if these policies were contrary to federal law. This leaves the negative implication that investment decisions are not preempted, nor are disbursements not using federal funds. Indeed, even if cities were to apply their anti-apartheid laws using federal funds, the laws themselves would not be preempted by the federal statute. For if Congress intended such preemption, this provison would have been entirely superfluous. There would be no need to penalize states and localities for following their own laws if these laws were invalidated by the federal legislation.

In all, the statutory language and legislative history fall far short of the compelling evidence of preemptive congressional intent required for a court to sustain a preemption attack upon state and local laws. See *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519, 540 (1979). If Congress intended to force states and municipalities to continue doing business with a regime they find morally repugnant or in a nation whose future they deem unstable, this intent has not been expressed in a manner sufficient to preempt local legislation. See Troyer, Slocombe & Boisture, Divestment of South Africa Investments, 74 Geo. L.J. 127, 160 n.135 (1985).

Moreover, a finding of no preemption is wholly consistent with the conceded primacy of the federal government in foreign affairs and international relations. The fact that the federal statute here deals with foreign policy does create a conflict with state and local actions where there would other-

wise not be one. Under the supremacy clause of the Constitution, local regulations must give way if they conflict with any federal statute, treaty, or executive agreement. The state and local measures at issue here, however, affect no pact with any foreign nation and are broadly consistent with the federal anti-apartheid act presently under consideration.

In virtually every instance in which the Supreme Court has invalidated an action by a state as unduly impeding the national government's foreign relations authority, it has done so because that action unambiguously clashed with a federal statute, treaty, or agreement. See, e.g., *United States* v. *Pink*, 315 U.S. 203 (1942) (invalidating a state policy of refusing to honor the Soviet Union's claim to assets because this policy conflicted with the Litvinov Agreement with that nation); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941) (invalidating state alien registration system that conflicted with the federal statutory system). In the absence of such authority, courts have been reluctant to presume a conflict between a state's action and foreign policy. See Pink, 315 U.S. at 231 (observing "the power of a state to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum" when no federal statute or treaty specifies otherwise).

Thus, in the recent case of *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159 (1983), the Supreme Court upheld a state corporate tax that included foreign subsidiaries in the calculation of income in spite of the fact that this action had "foreign resonances." Id. at 194. The Court found that the tax ran afoul of no act of Congress nor any treaty, and thus did not "seriously threaten" federal foreign policy. Id. at 196. For other examples of state measures upheld in spite of their potential impact upon foreign affairs, see *Clark* v. *Allen*, 331 U.S. 503 (1947) (upholding state reciprocal legislation conditioning the right of an alien to inherit property on the grant by the alien's country of similar rights to United States citizens); *K.S.B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977) (upholding buy-American statute against commerce clause challenge), cited with approval in *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 445 (1980); *J. Zeevi & Sons, Ltd.* v. *Grindlay's Bank, Ltd.*, 37 N.Y. 2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, cert. denied, 423 U.S. 866 (1975) (upholding state court's examination of fairness of judicial process of a foreign country to determine if it will enforce a judgment of that country's courts).

IV. THE UNRESOLVED PUZZLES A PREEMPTION HOLDING WOULD ENTAIL

Indeed, a decision to oust states and localities from this sphere would leave in place an ominous economic and political vacuum that no court could comfortably create. The Supreme Court has often stressed its reluctance to read federal legislation in such a way as to leave a sphere of activity entirely beyond deliberate public control in any suitable forum. See, e.g., *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 207-08 (1983); *Parker* v. *Brown*, 317 U.S. 341, 362-63 (1943). Yet that would be the inevitable result of inferring from the legislation at issue here an intent to occupy the field. For Congress has most assuredly put in place no mechanism of its own to replace, with some appropriate federal authority, the state and local officials and authorities who currently shape the investment decisions of public universities, pension managers, and other bodies.

Construing the federal statute in such a way as to subtract from state and local authorities the power to deflect investments from South Africa—perhaps power to divest prior holdings, or power to decline to expand such holdings, or some combination of these powers—without adding any new body to govern such matters would leave such power with no locus at all other than the federal courts themselves. To those courts would then fall such extraordinarily touchy and complex questions as whether a particular state or city acts improperly when it decides to slow down its rate of investing pension funds in a particular company doing business in South Africa. Is the state or city acting in a preempted manner if it is motivated wholly or partly by moral concerns about apartheid? What if its concerns are purely prudential but are infused, as even prudence must be these days, by recognition that the situation in South Africa is unstable in part because of apartheid and the world's reactions to it? If a decision to slow down the rate of future investments is not preempted, what of a decision to diversify existing investments?

For federal judges to review state and local investment portfolios from this perspective would be difficult at best and incompatible with the Article III judicial power at worst. As the Supreme Court has observed on numerous occasions, such judicial line-drawing is strongly disfavored in the foreign policy realm, an area of particular executive and legislative expertise. See, e.g., *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 194 ("[t]his Court has little competence in determining precisely when foreign nations will be offended by particular acts"). The decision as to what types of anti-apartheid measures should be preempted is a quintessentially legislative one, for as the Court has long noted, the conduct of foreign relations is largely immune from judicial control. See e.g., *Regan* v. *Wald*, 104 S. Ct. 3062, 3039 (1984) (noting "classic deference to the political branches in matters of foreign policy"); *Fiallo* v. *Bell*, 430 U.S. 787, 792-93 (1977); *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953); Harisiades v. *Shaughnessy* 342 U.S. 580, 588-89 (1952), *Goldwater* v. *Carter*, 444 U.S. 996, 1002-04 (1979) (Rehnquist, J., concurring); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423-28 (1964). Until or unless Congress explicitly demarcates which of the broad array of state and local measures affecting South Africa it intends to preempt, the judiciary should not be forced to pick and choose without more guidance.

To infer preemption in such circumstances would entail a delegation of extraordinary power to the courts. Such an interpretation would force courts to employ their own notions of state sovereignty in delineating the boundaries of the preemption by the federal government. This role would be at odds with the view of federalism espoused by the Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), which envisioned a scheme that relies upon the political branches of the federal judiciary to protect state sovereignty. See id. at 1017-19.

Whether or not Congress could constitutionally entrust such a role to federal judges, it is plain that it has not done so. And no amount of language, either in a statute's preamble or in the Congressional Record, referring to the virtues of having the nation speak with a single voice on this complex subject could possibly substitute for a decision by Congress to supplant local authorities with federal authorities, judicial or otherwise, in carrying out these delicate decisions.

TRIBUTE TO THE MINORITY LEADER

Mr. GORE. Mr. President, one Senator in particular deserves credit for opening the Senate's doors to television—Minority Leader ROBERT BYRD.

No Member of this body has a better understanding of Senate rules or a deeper respect for the Senate institution than the distinguished minority leader. When Senator BYRD began the long, uphill battle to bring TV to the Senate, we all knew that he had carefully weighed the consequences, with the institution's best interests foremost in his mind. Perhaps no other Member could have coaxed the Senate forward with such success.

It was an honor and a pleasure to work with the minority leader in launching a new era in representative democracy. The experiment is already a success. As the Senate approaches its 200th birthday, it remains as fresh and vital as our forefathers imagined, and more responsive than they could ever dream.

Last month, the Radio and Television News Directors of America recognized the minority leader for his contribution to open government. He received the organization's Distinguished Service Award at the RTNDA International Conference in Salt Lake City on August 27, 1986.

I ask unanimous consent that the minority leader's address to that conference be inserted in the RECORD.

There being no objection, the address was ordered to be printed in the RECORD, as follows:

AWARD INTERNATIONAL CONFERENCE OF THE RADIO AND TELEVISION NEWS DIRECTORS OF AMERICA

(By Senator Robert C. Byrd)

I am honored that you have singled me out to receive your Distinguished Service Award. In all sincerity, I thank you for this signal recognition.

In fact, however, I want to share the distinction of this award with you—the Radio and Television News Directors of America.

Bringing about regular live and recorded coverage of the day-to-day proceedings of the U.S. Senate was not an easy task. Over many long months, and in many hours of debate with our colleagues, I and other Senators had to labor long and hard to make the case for regular television and radio coverage of the Senate.

But in that effort, you were among our best allies. You, as individual broadcasters, and as an organization, also helped to bring about electronic media coverage of the Senate. Your persuasiveness, your earnestness, and your professional integrity as journalists and reporters helped to assuage the anxieties of many Senators, and to melt much of the opposition toward daily Senate broadcasts. For myself and for the American people, I thank you for helping to make

a major contribution to our democratic way of life.

I an confident that history will applaud our success in this effort. From its inception, the U.S. Senate was meant to be a reflective and unhurried assembly—as George Washington put it ". . . the place where legislation was sent to cool down.

But the Senate was never intended to be invisible. In this era, for many people, if something does not appear on a television screen, or come to them over their radio, it has no reality. In recent years, again and again, the American people have had opportunities to see and hear their Presidents. And the advent of broadcasts from the House of Representatives made the continued blackout and silence of the Senate even more puzzling.

Innumerable Americans have sat in the Senate gallery during Senate deliberations and have ever after counted that experience one of the highlights of their lives. Outside that on-site event, however, until now, the American people had to depend largely on secondhand reports to let them know what their Senators were doing.

Now, millions of Americans can sit at home, or in their offices, and witness for themselves by eye and by ear the proceedings of the U.S. Senate.

As of now, such Senate coverage is still somewhat of a novelty. But in time, we and you will mature in handling this new procedure. I predict that that maturing will add appreciably to our Nation's strength and to the endurance of our free democratic institutions. Our political system depends on an informed electorate. Woodrow Wilson said, ". . . the informing function of Congress should be preferred to its legislative function," In that regard, perhaps nothing that has been done in my many years as a Senator has a greater potential for helping the Senate to fulfill that function as will the electronic coverage of the Senate, and I am proud to have been, in some fashion, pivotal in bringing about such an important innovation.

Again, thank you for honoring me with your Distinguished Service Award, and thank you for helping to give the American people a clearer view of their elected representatives at work, as together we continue the paramount task of hammering out our destiny as a Nation.

Mr. THURMOND. Mr. President, I suggest the absence of a quorom.

The PRESIDING OFFICER. The clerk will call the roll.

□ 1240

Mr. THURMOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

Mr. THURMOND. Mr. President, I ask unanimous consent that the Senate now go into executive session to consider the Rehnquist nomination.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The PRESIDING OFFICER. The clerk will report the nomination.

The assistant legislative clerk read the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

The Senate resumed consideration of the nomination.

Mr. LEVIN. Mr. President, there is no more important duty for the Senate than the exercise of its advice and consent power for the appointment of Federal judges, and particularly the appointment of Supreme Court Justices. It is no exaggeration to say that the judicial candidates to whom we give our consent will make decisions that directly affect the lives of millions of Americans. A judge confirmed in the last two decades of the 20th century is likely to serve well into the 21st century and shape the destiny of our children and our children's children.

Two critical points must be stressed about the Senate's role in the appointment process. First, the framers of the Constitution intended the Senate to be an equal partner to the President in the process. Second, there is nothing in the language of the Constitution or in the subsequent history of Senate consideration of judicial nominees restricting the scope of the Senate's inquiry into the nominee's qualifications.

THE SENATE'S ROLE IN THE APPOINTMENT PROCESS

The language of the Constitution leaves open the question of the extent of the Senate's role in judicial appointments. Article II, section 2 provides that:

(The President) * * * shall nominate, and by and with the Advice and Consent of the Senate shall appoint * * * Judges of the Supreme Court, and all other Officers of the United States, whose appointment are not otherwise provided for, and which shall be established by law.

However, the process by which the authors of the Constitution arrived at this construction indicates that they meant the Senate to have at least an equal role to that of the President. Walter Dellinger, professor of law at Duke University, summarized the events leading to adoption of the final language as follows:

The original Virginia Plan, introduced at the Convention on May 29, 1787, provided that all judges would be appointed by the national legislature. By June 19, the Convention had decided that the whole legislature was too numerous for the appointment of judges, and lodged that power in the Senate acting alone. Attempts to confer the power on the President to the exclusion of the Senate were solidly defeated. George Mason stated that he "considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary Department itself." Only near the end of the Convention was it agreed to give the President any role in the selection of judges; even then the President's power to nominate was carefully balanced by requiring the concurrence of the Senate. That final language was not seen to dislodge the Senate from a critical role in the process. Gouverneur Morris paraphrased the final provision as one leaving to the Senate the power "to appoint judges nominated to them by the President."

Morris' words make clear that the proponents of appointment by Congress or the Senate alone did not feel they had lost. As Prof. Charles Black of Yale writes (79 Yale Law Journal, p. 661), they:

Were satisfied that a compromise had been reached, and did not think the legislative art in the process had been reduced to the minimum. The whole process suggests the very reverse of the idea that the Senate is to have a confined role.

In Federalist Paper No. 76, Alexander Hamilton, the main proponent of giving the President the power of appointment, argued against giving the President absolute power because it would:

Enable him much more effectually to establish a dangerous empire over that body (the Senate) than a mere power of nomination subject to their control.

He confirms that dividing the appointment responsibility between the President and the Senate was deliberate and would have a positive effect on the quality of appointments:

(E)very advantage to be expected from such an arrangement would, in substance, be derived from the power of nomination, which is proposed to be conferred on him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided.

Jefferson would have preferred to give the people the power to elect judges, and viewed "judicial independence from popular control" as incongruous with democracy. Although his viewpoint did not prevail in the end, he wrote, after the current construction was adopted, that the Senate's advice and consent power was intended "to prevent bias and favoritism in the President * * * and perhaps to keep very obnoxious people out of office of the first grade." (The Writings of Thomas Jefferson, vol. 8, p. 210.)

This brief look at what might be called the "legislative history" of the advice and consent clause makes clear that the Senate's role in judicial appointments is supposed to be an active one. The Senate is not a rubber stamp. The Senate ought not simply defer to the wishes of the President, even if the President is a popular one.

The popularity of a President does not diminish our duty under the constitution. It does not diminish the Senate's duty as a body, and it does not diminish the duty of individual Senators.

The delicate system of checks and balances upon which our democracy depends will only work if each branch of the Government is willing to assert its role by fulfilling its constitutional duties.

THE SCOPE OF THE SENATE'S INQUIRY

What factors can the Senate appropriately consider while it is carrying out its advice and consent duties?

The language of the Constitution itself provides no guidance in this area. We can get some guidance by examining the intent of the framers of the Constitution and by looking at Senate precedent. Ultimately, however, we have to determine what qualities we think a good judge should have, and what scope of inquiry is necessary to determine if the prospective judge has these qualities.

Professor Lively of the University of Toledo argued in a recent law review article that:

> Any reservations concerning the propriety of the Senate's focus upon a candidate's policy values should abate upon realization that many of the framers of the Constitution conducted precisely such as inquiry.

He we referring to the Senate's rejection, in 1795, of President Washington's nomination of John Rutledge to be Chief Justice. The rejection was based purely on Rutledge's opposition to the Jay Treaty, a treaty previously approved by the Senate. And, of course, a number of the Senators who voted to reject Rutledge had participated in writing the Constitution. (Southern California Law Review, v. 59, p. 551.)

An examination of the subsequent history of Senate advice and consent shows that the judicial nominee's policy values have consistently been considered. This has been particularly true of Supreme Court nominations. The Senate has rejected 25 out of 138 Supreme Court nominations. Out of these 25 rejections, 22 had policy reasons behind them.

To the extent that precedent is important them, there are sufficient examples in the Senate's history to justify looking beyond a nominee's general competence and integrity. But how far beyond should we go? What is it about the role of the judge—and particularly the Supreme Court Justice, and most particularly, the Chief Justice of the United States—that makes consideration of his or her policy values necessary?

A young Arizona lawyer explored these questions in an article he wrote for the Harvard Law Record in 1959. He lamented, with regard to the then recent confirmation of Charles Evans Whittaker to the Supreme Court, the "startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation." Pointing out that individual Justices of the Supreme Court "are not accountable in any formal sense to even the strongest current of public opinion," the author argued that the Senate ought to restore "its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."

By way of example, the author described in some detail the battle over the nomination of John J. Parker to the Supreme Court nearly 30 years before. He quoted approvingly from the CONGRESSIONAL RECORD several statements made by Senator William Borah of Idaho, leader of the forces opposing Parker's confirmation. "(The Supreme Court) passes upon what we do," Senator Borah said at one point. "Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions."

The author concluded by noting that Supreme Court justices have great latitude in interpreting vague Constitutional clauses like "due process of law" and "equal protection of the laws." Given this state of affairs, he asks rhetorically, "what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process?"

The young attorney who wrote this article was none other than William H. Rehnquist. While it was a well-reasoned argument for a broader Senate role in the appointment process, I think it actually went too far, and I think Justice Rehnquist, 30 years after writing it, would agree with me.

The young Mr. Rehnquist listed a series of cases then recently decided or before the Supreme Court—having to do with segregation and the rights of witnesses who invoke the fifth amendment—and regretted that the Senate hadn't shown any interest in Justice Whittaker's views on these cases. The implication was that it was acceptable and indeed desirable to ask a nominee's views of a particular case or opinion.

I do not agree. Justice O'Connor accurately, I think, pointed out the problem with this approach during her confirmation hearing. She said:

> I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter, or have morally committed myself to a certain position.

Indeed, I would say that if a nominee did answer questions asking about their views on specific issues likely to be central in decisions before the Court, I would be inclined to vote against them on that basis alone. A response would indicate to me that he or she did not understand that decisions should be guided by specific facts and arguments before the Court. A response would also indicate that the nominee is so driven by ideology or ambition that he or she was willing to prejudge matters to be presented to them.

However, there are two instances where I believe a nominee's policy values are relevant to his or her qualifications. The first instance is when the nominee's policy values are inconsistent with a fundamental principle on principles of American law. The second instance is when the nominee is so controlled by ideology that the ideology distorts their judgment and brings into question their fairness and openmindedness.

I am sorry to say that the nominee being considered by the Senate today, Justice William H. Rehnquist, is disqualified by both these standards.

I watched most of Justice Rehnquist's confirmation hearings on television, and reread portions of the transcript afterwards. I have read the speeches and articles he has written over the years. I have read some of his judicial decisions. And I also submitted two sets of questions directly to Justice Rehnquist, one before and one after the Judiciary Committee hearings, and received responses to these questions from him. My conclusions about this nominee are based on a careful study of the nominee's answers, the nominee's statements, and the nominee's actions.

JUSTICE REHNQUIST'S VIEWS ON INDIVIDUAL RIGHTS

In looking at Justice Rehnquist's "policy values," I am deeply troubled by his view that constitutional rights are based on support by the majority.

The Constitution, interpreted and applied by the Supreme Court, is the individual's best guarantee against the untrammelled exercise of Government power, and the minority's best protection against unjust treatment by the majority. If the rights of the minority are in principle less important, less worthy of protection than the "will of the majority" as expressed through duly enacted laws, then the Bill of Rights becomes essentially meaningless.

I was first struck by Justice Rehnquist's tendency to put the rights of the individual in the hands of the majority when I read the line in the famous "segregation memo" he wrote for Justice Robert Jackson which reads:

To the argument * * * that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.

Mr. President, I will show later why it is clear that the views in this memo were not Justice Jackson's views, as the nominee claims, but his own.

Since Justice Rehnquist was a young law clerk when he wrote these words, I would not necessarily have assumed that he still held this view. But this is a thread that runs through Justice Rehnquist's thought.

In a speech given on May 1, 1969 as part of a celebration of "Law Day," then Assistant Attorney General Rehnquist spoke about protesters whom he called over and over again the new barbarians, and expounded at some length on civil disobedience and the legitimacy of resistance to law in a democratic society. In the course of this discussion, Mr. Rehnquist made an implied threat against the protesters:

* * * Just as the minority has it within its power to frustrate the governance of the majority, so a large majority by process of constitutional amendment has it within its power to deny the right of free speech and free discussion to the minority. ("Law Day" speech, reprinted in Cong. Rec., November 18, 1971, 42133.)

In other words: "if we the majority decide we don't like your protest, we can force you to shut up." This type of argument is directly contrary to the spirit of our Constitution.

Remember that this was not a young clerk fresh out of law school speaking—this was an Assistant Attorney General of the United States, the head of the Office of Legal Counsel, who less than 3 years later was sitting on the Supreme Court.

The American Civil Liberties Union concluded in a report on Justice Rehnquist's record on the Court:

In his Supreme Court opinions and his extra-judicial writings, Justice Rehnquist rejects the notion that the Supreme Court has a special responsibility to protect civil liberties, to protect the individual against the excesses of the majority. Rather, he maintains that the Court's obligation is to protect the primary political structures of the government, which include the independence of the States and majority rule. (ACLU report, reprinted in Cong. Rec., September 11, 1986, S 12399.)

David Shapiro concluded in a Harvard Law Review article summing up Justice Rehnquist's first 4 years on the Court that his votes on cases were guided by three basic propositions, one of which was:

Conflicts between an individual and the government should, whenever possible, be resolved against the individual. (Harvard Law Review, vol. 90:293, p. 294.)

Justice Rehnquist himself provided an explanation for his strong tendency to favor "will of the majority" as expressed in duly enacted laws over the rights of the individual as protected by our Constitution. In a dissenting opinion he wrote for a 1972 death penalty case:

An error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best. (*Furman* v. *Georgia*, 408 U.S. 238, 468, 1972.)

I find Justice Rehnquist's approach to individual rights in our Constitution distressing. I see practically no recognition of the importance of the Court's role in protecting individual rights, and far too much recognition of the right or the power of the majority to impose its will on the minority or the individual.

In fact, it is more than distressing—it is flat out wrong to say, as Justice Rehnquist said and quite clearly believes, that the majority will determine what the constitutional rights of the minority are.

Justice Rehnquist has it exactly backward.

In this country, individual constitutional rights are beyond the reach of the majority. The Constitution's protections of individual rights are historic and fundamental, and the Supreme Court is their guardian. Justice Rehnquist does not accept that guardianship—and he is, thereby, an unacceptable chief trustee of individual rights.

JUDGMENT DISTORTED BY IDEOLOGY

There is another situation in which a nominee's "policy values" are grounds for rejecting that nominee. That situation arises when a nominee's personal views control their public judgments.

I believe it is inherent in the fact that judges are human that their judicial decisions will reflect their personal philosophies. But there is, I would submit, a difference between decisions which are controlled by ideology and those which are merely influenced by it.

Some individuals display an ideological fervor which distorts judicial temperament. That kind of fervor can result in actions and judgments which either violate or ignore constitutional principles. It can result in a situation in which judges are so controlled by ideology that they are unable or unwilling to look at all the facts, listen fairly to all arguments, evaluate critically all the legal precedents, and finally, decide cases judicially.

The Senate should not give its consent to nominees who come before us more as captives of ideology than creatures of reason.

LAIRD VERSUS TATUM

A good illustration of how Justice Rehnquist seems to let ideology overcome judgment is the case of Laird versus Tatum.

Justice Rehnquist's refusal to disqualify himself in the case of Laird versus Tatum was a breach of judicial ethics. His subsequent explanations of why he participated in the judgment ring hollow, and obscure more than they illuminate.

Briefly, here are the facts of the case: The Army was conducting a surveillance program aimed at Vietnam war protesters. A group of protesters brought suit in the District of Columbia to enjoin the Government from continuing the surveillance program. The plaintiffs claimed that they had standing to bring this action on the grounds of interference with their constitutional right to free speech. The Court of Appeals in the D.C. Circuit held that their lawsuit was maintainable. However, by a vote of 5 to 4, with Justice Rehnquist casting the deciding vote, the Supreme Court reversed this decision, ruling that the plaintiffs lacked standing and therefore the suit should be dismissed without going into the merits of the case.

The plaintiffs filed a motion to disqualify Justice Rehnquist. They argued that he was disqualified from hearing the case on the basis that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate subcommittee hearing. In a memorandum, Justice Rehnquist responded to this motion with an explanation of the reasons for his decision not to disqualify himself.

Less than a year after Laird versus Tatum was decided, an article in the Columbia Law Review—January 1973—argued forcefully that Justice Rehnquist had erred in his decision not to disqualify himself. More recently, we have had several detailed analyses of the recusal issue by some of the foremost authorities on legal ethics in the country. I would particularly commend to my colleagues the analysis requested by Senator MATHIAS that was done by Prof. Geoffrey C. Hazard of Yale Law School. Professor Hazard was instrumental in drafting the American Bar Association's Code of Judicial Conduct. He is perhaps the Nation's preeminent expert on judicial ethics. And he has concluded, in his letter to Senator MATHIAS, that Justice Rehnquist not only should have disqualified himself from Laird versus Tatum under the statute then in force, but that he misrepresented the facts to the parties involved and to his colleagues on the Supreme Court. He also suggests that Justice Rehnquist was less than candid to the Senate in

answering questions concerning Laird versus Tatum.

I believe Justice Rehnquist prejudged the facts at issue, and should not have participated. Rather than discussing the error of his initial decision not to recuse himself—since this has already been done by the experts—I would like to focus on Justice Rehnquist's subsequent explanations of his decision. For I think that Justice Rehnquist's responses and justifications are revealing—and, in my opinion, extremely troubling.

The entire controversy over Laird versus Tatum—not only Justice Rehnquist's initial refusal to disqualify himself but his subsequent commentary on that decision—gives disturbing evidence that the nominee's ideology is so deeply imbedded that it tends to overcome good judgment and objectivity.

Let me give three examples of what I am talking about.

First, Justice Rehnquist failed to discuss a significant fact in his memorandum responding to the motion to recuse him. Referring to his appearance before a Senate subcommittee in 1971 where he testified on behalf of the Justice Department regarding the Army's military surveillance program, he stated that:

> There is one reference to the case of Tatum v. Laird in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin.

He went on to quote the first reference, which was as follows:

> However, in connection with the case of Tatum v. Laird, now pending in the U.S. Court of Appeals for the D.C. Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed.

He then dismissed the second comment by simply stating that it was "a discussion of the applicable law with Senator Ervin, the chairman of the subcommittee, during my second appearance." He did not quote the second comment, and indeed there is no further reference to it in the rest of the memorandum.

His explanation of why the first comment did not constitute grounds for disqualification was that he was merely the keeper of the computer printout, that he had never "seen or been apprised of" its contents, and that the first time he learned of the existence of the case of Laird versus Tatum was while he was preparing to testify before the Ervin subcommittee. (93 SCR, 409 U.S. 827, p. 10.)

As for the second comment, the reader is left to wonder what it was. We have to look at the plaintiffs' motion or the subcommittee hearing record to find out.

In response to a question by Senator Ervin about the Government's right to put under surveillance people who are exercising their first amendment rights, Assistant Attorney General Rehnquist responded in part:

> My only point of disagreement with you is to say whether as in the case of Tatum v. Laird that has been pending in the Court of Appeals . . . that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government. (Ervin hearings, vol. 1, pp. 864-865.)

Justice Rehnquist was expressing the view here that Laird versus Tatum was not justiciable. For those who find the meaning of his statement a bit unclear, I would point to the operative words "My only point of disagreement with you." He was disagreeing with Senator Ervin's contention that there was a first amendment issue here, that these protesters' rights were being violated when the Army put them under surveillance. And this was precisely the controversy in Laird versus Tatum when it came before the Supreme Court. The conclusion is inescapable: Assistant Attorney General Rehnquist expressed the view before a Senate subcommittee that the case was nonjusticiable; Supreme Court Justice Rehnquist failed to disqualify himself from deciding whether the case was justiciable.

In light of the content of this second statement and its specific reference to Laird versus Tatum, I find Justice Rehnquist's failure to quote or explain it highly disturbing. Maybe he could have found a way to explain that he was not really saying what he appeared to be saying in this statement, that it really was simply a "discussion of applicable law." The fact that he avoided quoting or explaining it leads me to conclude that he was aware that it would severely weaken his case for not disqualifying himself.

□ 1310

I also have serious questions about the nominee's description of the extent of his involvement in formulating the Nixon administration's policy on domestic surveillance by the Army. Evidence which has come to light since 1972 indicates that he was far more involved in developing this policy than he revealed when Laird versus Tatum was decided. In particular, a draft memorandum he prepared for submission to the White House discussed the legal implications of allowing the Army to participate in surveillance activities. This memo was first made public in a little noticed appendix to the Ervin subcommittee's hearings. It resurfaced as one of the documents that the Reagan administration initially refused to provide to the Judiciary Committee but later supplied.

In this memo, Assistant Attorney General Rehnquist wrote that the U.S. Army Intelligence Command "may assist" in the collecting of raw intelligence on civilian political activity, but that "in order to preserve the salutary tradition of avoiding military intelligence activities in predominantly civilian matters," the Army "should not ordinarily be used to collect" such data.

I assume that as the head of the Office of Legal Counsel, Assistant Attorney General Rehnquist did not write this memo off the top of his head. He must have done legal research himself, or at the very least, discussed the issue with his subordinates.

If my assumption is a fair one—which I think it is—then Justice Rehnquist's subsequent statements about his involvement in the surveillance policy have been less than candid.

The plaintiffs who filed the motion to recuse Justice Rehnquist from the case did not know about this memo. They based their objection to Rehnquist's participation in the case on his public statements made during the Ervin hearings. But as Professor Hazard points out in his analysis of the case:

> • • • it was Justice Rehnquist's responsibility to address and resolve all issues concerning his disqualification. It was not the parties' responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts.

But they did not have access to these facts, and Justice Rehnquist did not volunteer them. Professor Hazard continues:

> Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement as counsel in the transaction, that was at least as significant but which was not publicly known. It was his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Indeed, it is even more vital to fairness in adjudication that a judge resolve grounds of recusal which arise from confidential facts, for the parties ordinarily are helpless to raise such grounds.

Justice Rehnquist was not forthcoming in 1972—and in 1986, he claimed memory failure. He told Senator MATHIAS in response to a written question subsequent to the hearing:

> I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities.

Note that the nominee said he did not recall any participation. Considering the great significance and controversy surrounding this policy at the time and the continuing discussion in the years since, it is simply inconceivable to me that the nominee would have "no recollection." I can understand his not recalling a particular memorandum, but I again am sorry to say I have trouble accepting his statement that he draws a complete blank on his participation in formulation of the policy.

The final area of my inquiry into Justice Rehnquist's conduct in the Laird versus Tatum controversy concerned another aspect of his 1972 memorandum which denied the motion for recusal. From the outset, he limited the standards by which he would judge whether his nonrecusal had been the correct decision. He cited the statute then in effect, title 28, section 455 of the United States Code as the applicable standard:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

He went on to note that the plaintiffs had also referred in their motion to provisions of the ABA's Code of Judicial Conduct. A revised version of the code had existed in draft form at the time Laird versus Tatum was decided by the Supreme Court, having been approved by a special committee on standards of judicial conduct but not by the full ABA. However, when Justice Rehnquist wrote this memorandum of explanation, the revised code had been adopted by the ABA's House of Delegates, and had therefore become the official standards of judicial conduct for members of the ABA.

The statute was binding on Justice Rehnquist while the ABA's Code was not. But he himself did not dispute that the ABA Code provisions were relevant to his decision. Here is his explanation of those provisions:

Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration.

His decision not to give the ABA Code separate consideration was based solely on his contention that they were not "materially different" from the statute.

What are these standards that, in Justice Rehnquist's view, did not "materially differ" from the statute quoted above?

The ABA Code reads in part as follows:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

The ABA also added a commentary at the end of this section dealing specifically with the standards of disqualification for former government officials. This commentary is intended as an explication of the meaning of the standards: "* * * a judge, formerly employed by a governmental agency * * * should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association."

It is evident that the ABA Code imposes a more stringent standard of disqualification than the statute as it existed in 1972, and the drafters of the revised code certainly intended it to do so. According to the Columbia Law Review in 1973:

Their recent revision of the Canons was prompted by dissatisfaction with standards such as those prescribed by section 455 and the old Canons. (Columbia Law Review, v. 73:106, p. 119.

The most obvious way in which the revised ABA Code required a more rigorous standard of disqualification lay in the phrase "a proceeding in which his impartiality might reasonably be questioned," clearly a broader standard than anything in Section 455 of the statute.

Justice Rehnquist was asked about his failure to consider the ABA standards during the 1986 Judiciary Committee hearings. He responded to a question from Senator Leahy as follows:

Justice REHNQUIST. Justice Stewart, who was a good friend of mine, I remember, after I wrote this opinion—you know it may have been months afterwards—he had been on the drafting committee of the ABA standards, and he told me that in some respects he thought my comparison of the ABA standards and the statutory standards was incorrect and that the ABA standards had intended to be more stringent."

Senator LEAHY. Looking at the ABA standards, if that was what you had used as your guide, would you have recused yourself?

Justice REHNQUIST. I just can't put myself back in that position, Senator, not having the ABA standards in front of me. I really just can't answer. (transcript, July 30, 1986, p. 196.)

□ 1310

I was not satisfied with this unresponsive response. It was so clear to me that the ABA standards were "materially different" from the statute, that I submitted to Justice Rehnquist a followup to Senator LEAHY's question:

Having heard Justice Stewart's comments and having now had a chance to reread the ABA standards in effect in 1972, do you still believe that the 1972 ABA standards were not "materially different from the standards enunciated in the congressional statute" in effect at that time?

The nominee's answer provides another example of his tendency to make obfuscating distinctions when it suits his purpose. His response to my question was:

I think that the 1972 ABA standards were materially different from the provisions of 28 U.S.C. 455, as it stood in 1972, on the question of disqualification for financial interest. I believe it was this point to which Justice Stewart's comments to me were addressed. In so far as disqualification for bias is concerned, the language of the canons is phrased differently from the relevant language of section 455, and could require a result different from that required under section 455 in a particular case.

Here the nominee makes a distinction between the disqualification for financial interest and the disqualification for bias, a distinction he failed to make either in his 1972 memorandum or in his responses to Senator LEAHY. The financial interest section of the canons is, he admits "materially different" from the statute; the personal bias section, on the other hand, "is phrased differently from" the statute, "and could require a result different from" the statute "in a particular case." Presumably he is saying that the personal bias section of the ABA Code is not "materially different" from the statute. It's just "phrased differently" and "could require a different result in a particular case." Not, I assume, in the case of Laird versus Tatum.

Justice Rehnquist's supporters might point to this response as an example of his brilliant legal mind. I see it as an example of cleverness, of obfuscation, and disingenuousness. The nominee's ability to avoid the simple and straightforward, to obfuscate and play with words in order to evade their plain meanings—these are not admirable qualities. It may require a highly developed intellect to do these things as smoothly as Justice Rehnquist does them. But this is not the type of intellectual quality we should look for in a Chief Justice.

Madam President, Justice Rehnquist's use of words to distort and obfuscate and his lack of directness were analyzed in detail in an extraordinary and chilling Law Review article in the New York University Law Review, April 1982, which compared his craftiness in wordsmithing to that of Captain Vere in Melville's "Billy Budd," which was a classic American Novel. This article was written by Prof. Richard Weisberg. It is entitled "How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist."

Billy Budd who was an innocent sailor admired by all for his simple directness. He was brought to trial and executed as a result of the masterful rhetorical wiles of Captain Vere.

The New York University Law Review article compares the openness of Billy Budd with the ingratiating indirectness and covertness of Captain Vere. Vere's clever use of language overcomes the fact that the trial was illegal and improper.

The article analyzes in detail his opinion in the case of Paul versus Davis.

The author shows, at great length, how Captain Vere and Justice Rehn-

quist by dint of being "verbally and hierarchically superior adjudicators can give the force of seeming legality to drastic decisions the law does not support" and how "an adjudicator can win over an audience by considerately providing it with the story it needs to hear, thereby assuaging its doubts and dampening its spirit for further rational inquiry."

DISTORTED MEMORY, LACK OF CREDIBILITY

During the Judiciary Committee hearings, I was interested to see how Justice Rehnquist responded to questions about his past actions. Several controversial issues which had come up during his initial confirmation in 1971, but had never been satisfactorily resolved, came up again. In each case there was some new information regarding these issues that had been unavailable in 1971. Regarding the charges of voter harassment in Arizona, there were a number of new witnesses coming forward to claim that they had seen Mr. Rehnquist personally challenging voters in the late 1950's and early 1960's. On the issue of memos written while Mr. Rehnquist was a law clerk for Justice Robert Jackson, there had been only one memo publicly available at the time of the 1971 hearings; now there were a number of others.

These controversies raised questions about the nominee's sensitivity to individual rights throughout his career. The hearing gave him an opportunity to clear up doubts about his sensitivity, by clearing up the unresolved questions about these controversies.

After watching the hearings, reviewing the transcript, and closely analyzing Justice Rehnquist's answers to my additional written questions, I do not believe that either of these controversies have been satisfactorily resolved.

I was troubled by Justice Rehnquist's lack of candor in the hearings. His answers to what were, in my view, legitimate and relevant questions, have convinced me that he tends to distort memory and bend facts. His explanations were simply not credible—they did not clear up anything.

THE JACKSON MEMO

Justice Rehnquist served as a law clerk for the late Associate Justice Robert H. Jackson in 1952 and 1953. In that capacity, he did research for the Justice's opinions and wrote what are called cert memos—summaries of cases for which certiorari or Supreme Court review was being sought.

After Justice Rehnquist's 1971 confirmation hearings were over, Newsweek magazine published the text of one of the memos he had written while a law clerk. This memo, entitled "A Random Thought on the Segregation Cases," caused quite a stir, and became one of the focal points of the floor debate on the Rehnquist nomination. Opponents of Mr. Rehnquist's nomination took the memo at face value and assumed it to be a statement of Mr. Rehnquist's own views—not an unreasonable conclusion to draw considering that it was written in the first person, bore his initials at the bottom, and had a very informal and personal sounding title. They presented it in 1971 as evidence of his unsuitability to serve on the Supreme Court because in it he apparently argued that the Court should uphold segregation laws. Specifically, the memo contained the statement that Plessy versus Ferguson—the 1896 case supporting the constitutionality of "separate but equal" education laws—"was right and should be reaffirmed."

In an effort to set the record straight and head off growing opposition to his nomination, Mr. Rehnquist wrote a letter to Senator Eastland, Chairman of the Judiciary Committee, in which he explained that, to the best of his recollection:

> The memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views at the conference of the Justices rather than as a statement of my views.

The nominee, in a further effort to dispel the doubts some Senators might have about his views on segregated education, added at the end of his letter:

> In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the Brown decision.

This letter to Senator Eastland arrived in the middle of the Senate floor debate, on December 8, 1971. Mr. Rehnquist was confirmed by the Senate on December 10, 1971, by a vote of 68-26. But no one had an opportunity to ask Mr. Rehnquist questions about the memo while he was under oath, nor was anyone able to challenge this explanation of its contents in 1971.

Now, it has been said by Justice Rehnquist's supporters that we shouldn't harp on things written over 30 years ago, and that there is no reason to doubt the nominee's 1971 statement that he fully supported "the legal reasoning and rightness * * * of the Brown decision." I submit that the question is not what Justice Rehnquist believed 30 years ago and whether he still holds those beliefs today—it is how he represented to the Senate—in 1971 and in 1986—what he believed, what Justice Jackson believed, and for what this memo was intended.

We now have a better opportunity to examine the evidence relating to this memo than the Senate had in 1971. This evidence was brought together in a very comprehensive way by Richard Kluger in a section of his book "Simple Justice," an account of the school desegregation cases of the 1950's. After reading Mr. Kluger's account, it is very difficult to conclude anything other than that the memo does not contain Justice Jackson's views, and must therefore have been either an expression of law clerk Rehnquist's views or an attempt on the part of law clerk Rehnquist to provide Jackson with the pro-Plessy point of view. In either case, the evidence casts serious doubt on Justice Rehnquist's account of the nature of his memorandum.

□ 1330

Mr. LEVIN. Madam President, for now, let me add one or two of my own observations based on the evidence I have seen and some of the questions I asked Justice Rehnquist in my two letters to him.

In my first letter to Justice Rehnquist, I asked him on what basis he stated that the views expressed in the memo were those of Justice Jackson. I wondered whether he could recall anything specific Justice Jackson had told him to indicate his views on the "separate but equal" doctrine. I wondered this because I have always been a great admirer of Justice Jackson, I am familiar with his writings, and I find it difficult to believe that he would ever have expressed the view that "Plessy versus Ferguson was right and should be reaffirmed."

Justice Rehnquist reiterated what he had said in his 1971 letter to Senator Eastland: That he recalled considerable oral discussion with Justice Jackson before the Court conference on the school segregation cases; that although he did not recall the specific content of these discussions he did recall "Justice Jackson's concern that the conference have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality"; and that he still adhered to the statement in his 1971 letter that the memo was intended to reflect views Justice Jackson had expressed in those discussions.

Frankly, I was not satisfied by this response. It still seemed to me, looking at the language of this memo, that it was a young law clerk talking in this memo, not a distinguished Supreme Court Justice. I centered in on one sentence in particular:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed.

What "liberal colleagues" had Justice Jackson been excoriated by and when? Why would he have been excoriated by his colleagues for views he was about to express at an upcoming Court conference?

In a followup letter, I asked Justice Rehnquist this precise question:

Did Justice Jackson tell you during these oral discussions that he had been excoriated by liberal colleagues for his views on Plessy? If he didn't tell you, then on what basis did you include this line in the momo?

Justice Rehnquist's answer was: "As I indicated in my answer to your quesiton of July 23, 1986, I have no recollection today of the specific content of my oral discussions with Justice Jackson relating to the points that he tentatively intended to make at the Court's Conference on the Brown case. I do not recall Justice Jackson telling me in those discussions that he had been excoriated by liberal colleagues for his views on the Brown case. It is my strong sense, however, that Justice Jackson acknowledged during our discussions that he fully expected to be criticized sharply by some of his colleagues if he took the position that Plessy versus Ferguson should be reaffirmed."

This last sentence is, to my knowledge, the first time that Justice Rehnquist has publicly attempted to provide an explanation for the phrase "excoriated by my 'liberal' colleagues." And if we look at it in light of what the memo actually says, we realize that it is no explanation at all. Justice Rehnquist has a "strong sense" that Justice Jackson "fully expected to be criticized sharply" by his fellow Justices "if he took the position that Plessy * * * should be reaffirmed." But the memo clearly says "I have been excoriated." It doesn't say "I will be excoriated" or even "I might be excoriated if I take this position." It says "I have been excoriated," and the question remains, "by whom?"

I should like to quote briefly from Richard Kluger's discussion of this sentence.

Is it possible that so confident and civilized a man as Robert Jackson would have told his brother Justices anything remotely approaching what Rehnquist writes at the end of his memo purportedly reflecting Jackson's views * * * The "I" in that passage, according to Rehnquist, was supposed to be Jackson, not his clerk, but when and where might Jackson have been excoriated by his "liberal" colleagues? And what colleagues might those be? Surely not his fellow Justices, who would hardly have spoken ill of him for expressing genuine convictions. A far more plausible explanation might be that the "I" of the memo is Rehnquist himself, referring to the obloquy to which he may have been subjected by his fellow clerks, who discussed the segregation question over lunch quite regularly, who were almost unanimous in their belief that Plessy ought to be reversed, and who were, for the most part, "liberal" * * * That Rehnquist was ideologically a pole apart from his fellow clerks that year is suggested by the comment of Harvard law professor Donald Trautman, who clerked for Justice Frankfurther that term. "As I knew him, he was a reactionary," Trautman told the Harvard Law Record of October 24, 1971 * * *." ("Simple Justice", p. 608.)

It should also be pointed out that the statements of the only two living people who might have some firsthand knowledge of the memo itself or Justice Jackson's expectations from his law clerks do not corroborate Justice Rehnquist's account of the memo's content and purpose.

Donald Cronson, Justice Jackson's other law clerk at the time the memo was written, cabled a message to Justice Rehnquist during the Senate debate in 1971. In this message, he recalled that after he had written one memo contending that Plessy had been wrongly decided but that the Court should leave it to Congress to change the practice of segregation, Justice Jackson requested a second memo "supporting the proposition that Plessy was correctly decided." He further told Justice Rehnquist that he remembered the second memo as a collaborative effort, in fact going so far as to say that this second memo was probably "more mine than yours."

Mr. Cronson's account raises more questions than it answers, and it certainly does not correspond to what Justice Rehnquist recalls. Justice Rehnquist has never mentioned the first memo, nor has he indicated that the memo he supposedly authored (and which bore his initials) was a collaboration between himself and Mr. Cronson. Finally, there is certainly nothing in Mr. Cronson's account to indicate that Justice Jackson wanted a second memo to "reflect his views," only that he wanted a second memo reaching the opposite conclusion about Plessy.

Another person who might have confirmed Justice Rehnquist's account is Mrs. Elsie Douglas, Justice Jackson's secretary and confidante for his last 9 years on the Court. But Mrs. Douglas, in interviews she gave in 1971 and in a recent letter to Senator KENNEDY, expressly denies that the views expressed in the memo were those of Justice Jackson rather than his clerk's. In her August 8, 1986 letter to Senator KENNEDY, she says: "Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs."

So we are left with no credible support for Justice Rehnquist's explanation of the memo. And as I have already described, the internal evidence, the wording of the memo itself, strongly indicates that these could not have been Justice Jackson's views.

One other piece of evidence has been brought into the public realm since the 1971 debate. This is the collection of memos written by law clerk Rehnquist for Justice Jackson which are among Justice Jackson's papers at the Library of Congress. A reading of these memos should enable us to test the nominee's contention in his 1971 letter to Senator Eastland that "while (Justice Jackson) did expect his clerks to make recommendations based on their memoranda as to whether certiorari should be granted or denied, he very definitely did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided." In other words, the nominee was suggesting that the segregation memo could not have contained his own views because it was not normal practice to put his own views into memos since Jackson frowned on that sort of thing.

□ 1340

If one looks at the "cert" memos Rehnquist wrote for Justice Jackson, however, one finds numerous instances of personal opinion and informal observation being injected into a review of the facts of the case. Let me give just a few examples.

In a memo discussing the Rosenberg case, he wrote the following:

In my opinion, if they are going to have a death sentence for any crime, the acts of these ptrs (petitioners) in giving A-bomb secrets to Russia years before it would otherwise have had them are fitting candidates for that punishment. It is too bad that drawing and quartering has been abolished.

In a memo commenting on three lawsuits by baseball players against the major leagues for alleged violations of the Sherman Act, he wrote:

Before making any recommendation, I feel it is only fair to lay bare my strong personal animus in these cases * * * I feel instinctively that baseball, like other sports, is sui generis, and not suitably regulated either by a bunch of lawyers in the Justice Department or by a bunch of shyster lawyers stirring up triple damage suits.

And in a case involving Jehovah's Witnessess who were convicted for insisting on making speeches in city parks in violation of local ordinances, he wrote:

I personally don't see why a city can't set aside a park for ball games, picinics or other group activities without having some outlandish group like Jehovah's Witnesses commander the space and force their message on everyone.

Clearly, whether or not Justice Jackson welcomed the personal views of his law clerks in the memos they submitted to him, law clerk Rehnquist often included his views in the memos he submitted to Justice Jackson.

Regardless of what his views on segregated education were at the time of his clerkship, Justice Rehnquist's account of the memo on the segregation cases is contradicted by external accounts and by the wording of the memo iself. His explanations of these contradictions in 1971 and again within the past month do not stand up to careful scrutiny.

It will be argued that it was a long time ago, and we shouldn't necessarily expect Justice Rehnquist to remember the details of one memo out of the dozens he must have written. However, let me point out what Justice Rehnquist did not say. He did not say:

To the best of my recollection, this was intended to the Justice Jackson's views; however, I might be wrong—it was a long time ago, my memory is fuzzy—it may have actually been my own views—even though those are no longer my views. It may have even been just an effort to provide Justice Jackson with the arguments in favor of sustaining Plessy.

But this is not what Justice Rehnquist has said. He has said repeatedly—and has stood by his statement under repeated questioning—that these were intended to be Jackson's views, and he has gone to great lengths to prove this, even attempting an explanation for the "excoriated by liberal colleagues" line in his response to my question.

I am saddened to say I do not believe Justice Rehnquist's account of the Jackson memo.

VOTER CHALLENGING IN PHOENIX

Another controversial issue that did not arise until after the 1971 Judiciary Committee hearings had ended was the charge that Mr. Rehnquist participated in challenging of voters in Phoenix area elections during the late 1950's and early 1960's. Affidavits from six individuals were submitted to the committee alleging that Mr. Rehnquist had challenged minority voters as part of a "ballot security" program organized by the Arizona Republican Party and aimed at precincts with a large percentage of Black and Hispanic voters. The committee declined to reopen the hearings. However, Senators Bayh, Hart, and KENNEDY submitted additional written questions to the nominee, and one of the things they asked him to respond to were these charges of voter challenges.

In his response to the Senators, and also in an earlier affidavit submitted to the chairman of the committee, Mr. Rehnquist flatly denied all the specific allegations of those who had come forward to charge him with voter challenging activities. These charges all involved alleged incidents in the elections of 1958, 1960, 1962, 1964, 1966, and 1968.

The nominee in his letter to the Senators also made more general statements of denial. He quoted from his affidavit to Chairman Eastland, which read in part: "I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment of voters by other persons." Then he added the following critical line: "In none of these years (1958-68) did I personally engage in challenging the qualifications of any voters." (CONG. RECORD, November 24, 1971, p. 43086)

In the course of the 1986 Judiciary Committee hearings, five new witnesses came forward to testify, under oath, that the nominee had engaged in voter challenging activities. After the hearings were over, three other individuals submitted affidavits swearing that the nominee had challenged voters.

Six other witnesses testified, under oath, that they had not seen Justice Rehnquist challenging voters in the years in which he was allenged to have done so. However, none of these witnesses was with Mr. Rehnquist during the entire time of any of the elections in question.

Finally, the nominee himself testified, under oath, that he had not committed any of the alleged acts. He repeatedly and specifically denied having done what the five witnesses claimed he had done.

So, we have a situation where it is one person's word against another's. Everyone cannot be telling the truth. Either the five witnesses (nd the nine who submitted affidavits after the hearings in 1971 and 1986 are wrong or the nominee is wrong.

What I focussed on relative to the issue of voter challenges, as I did with the segregation memo, was the way Justice Rehnquist responded to questions on the issue. And I have to say again that I was struck by his lack of candor. His painstakingly constructed, hedging responses to straightforward questions did nothing, in my opinion, to clear the air. He had the opportunity to dispel the doubts of many Senators about his credibility. He did not take this opportunity.

I would like to quote briefly from two exchanges between Justice Rehnquist and members of the Judiciary Committee on July 30, 1986, which I think are revealing:

Senator KENNEDY. I gather from your response to my questions that you deny categorically that you were engaged in any of these activities that are identified by any of these individuals in any of the polling places that were mentioned.

Justice REHNQUIST. When you refer to these activities, Senator, that may cover a lot.

KENNEDY. Just the ones I read about.

REHNQUIST. Would you read them to me again?

(Kennedy goes through each charge again, and Justice Rehnquist denies each one)

KENNEDY. Well, the activity described basically is personally challenging voters. That is the activity alleged, and you categorically deny ever having done that in any precincts in the Maricopa County in the Phoenix area in any election, is that correct?

REHNQUIST. I think that is correct.

KENNEDY. Well, what is "I think" * * * If you are talking about harassing or intimidating voters is not something you are going to forget very much about.

REHNQUIST. I thought your qestion was challenging. Now you say harassing or intimidating. As to harassing or intimidating, I certainly do categorically deny that, anytime, anyplace.

If you are talking about challenging, I have reviewed my testimony, and I think I said I did not challenge during particular years. I think it is conceivable that in 1954 I might have been a poll watcher at a westside precinct.

KENNEDY. Well, did you challenge individuals then?

REHNQUIST. I think I was simply watching the vote being counted.

* * * * *

KENNEDY. Well, you would remember whether you challenged them now, Mr. Justice, would you not? Did you at any time challenge any individual?

REHNQUIST. A challenger, Senator, was someone who was authorized by law to go to the to the polling place and frequently the function was not to challenge, but simply watch the poll, watch the vote being counted.

KENNEDY. Well, have you ever personally challenged any individual in any precinct?

REHNQUIST. I do not think so * * * I am not entirely sure * * * I have responded in each case that you said to say that I did not agree with it, but if you are asking me whether over a period from 1953 to 1969 I ever challenged a voter at any precinct in any election, I am just not sure my memory is that good.

(Transcript, July 30, pp. 110-112)

* * * * *

SENATOR METZENBAUM. Did you ever personally confront voters at Bethune precinct?

Justice REHNQUIST. Confront them in the sense of harassing or intimidating?

METZENBAUM. No, in the sense of questioning them, asking them about their right to vote, asking them about the Constitution, asking them to read something, asking them questions having to do with their voter eligibility?

REHNQUIST. And does this cover Bethune precinct for all years?

METZENBAUM. Yes, yes. Did you ever personally confront. * * *?

REHNQUIST. I do not believe that I did.

METZENBAUM. Would you categorically say you did not?

REHNQUIST. If it covers 1953 to 1969, I do not think I could really categorically say about anything.

METZENBAUM. Do you think at some time, some point, you did personally confront voters at bethune precinct?

REHNQUIST. No, no I do not.

METZENBAUM. Well, then, what do you mean when you qualify your answer?

REHNQUIST. Well, to the best of my recollection. You are talking about something in 1953; it would have been 33 years ago.

METZENBAUM. Mr. Justice, I am not talking about your being able to remember where you were on the 3rd day of June 1952. I am talking about whether you ever confronted people and said to them: 'Can you read this Constitution?' 'What educational background do you have?' Challenge them in their right to vote. And you are saying that you do not remember. And I am saying to you, is it possible that a man as brilliant as you could not remember if you had done that?

REHNQUIST. Senator, challenging was a perfectly legitimate thing.

METZENBAUM. But you told the Senate that you never challenged anybody.

REHNQUIST. I believe I told the Senate, Senator, in 1971, over a given period of years, I did not think I had challenged some, and I stand by that testimony. I think you are broadening it to go way back into the early 1950's.

METZENBAUM. You said in none of these years—that being 1958 to 1968—did I personally engage in challenging the qualifica-

tions of any voters. Did you do it before that? Did you challenge voters before that?

REHNQUIST. I do not believe I did, no. Again, I point out that that is thirty years ago. (Transcript, July 30, pp. 133-134)

□ 1350

Well, Madam President, what astonishes me about these exchanges is that they could have been considerably shortened or avoided altogether if Justice Rehniquist had shown a little bit of candor. He was not forthcoming—he adopted a policy of avoiding fuller explanations. He could have said: "Senator, I don't recall any of the alleged incidents taking place. I am certain I never harassed or intimidated anyone. I might have challenged some voters at some precinct in some election—that was part of my job as a pollwatcher—but I never did anything that was illegal." He could have done that.

But, rather than offering a candid statement, he offered only qualifications, split hairs, and fine distinctions—avoiding the basic questions being raised about his sensitivity to the rights of citizens. He could have convinced me that he sincerely believed in the importance of those rights by giving straightforward, candid answers. He did not. I am afraid I do not believe his denial of voter challenging.

INSENSITIVITY TO THE RIGHTS OF CITIZENS

Because I found Justice Rehnquist's explanations of the segregation memo and the charges of voter challenging unbelievable, my doubts about his sensitivity to individual rights grew. And when I examined some of the nominee's past writings and speeches, my doubts were further confirmed.

There has been a discernible pattern to Justice Rehnquist's words and actions. It is a pattern of insensitivity to the rights of U.S. citizens. I am talking about fundamental rights, such as the right to vote, the right to peaceful and nonviolent protest and the exercise of first amendment rights, the right to own property, and the right to an equal educational opportunity. And when it comes to matters as significant as the individual's exercise of these rights, Justice Rehnquist appears to me to display a basic insensitivity.

THE RESTRICTIVE CONVENANT IN THE VERMONT DEED

A new finding at the 1986 hearings was the existence of a restrictive convenant in the deed on some Vermont property Justice Rehnquist purchased in 1974. The convenant reads: "no feet of the herein conveyed property shall be leased or sold to any member of the Hebrew Race."

During the hearing, Senator LEAHY questioned the nominee about this provision of the deed:

Senator LEAHY. Are you aware of that covenant in your deed?

Justice REHNQUIST: Not at the time, Senator. I was advised of it a couple of days ago.

LEAHY. Did you read the deed that you got on your property?

REHNQUIST. I certainly thought I did, but I'm quite sure I didn't note that.

* * * * *

LEAHY. What was your reaction when you heard about it?

REHNQUIST. I was amazed.

LEAHY. As a lawyer, how do you feel about that language?

REHNQUIST. Well, I think it's unfortunate to have it there, but it is meaningless in today's world, I think.

(Transcript, July 30, pp. 186-187)

Several days later, Justice Rehnquist wrote to Chairman THURMOND, explaining that "review" of his file on the purchase of the Vermont property had turned up a letter from his attorney dated July 2, 1974. There is a clear reference to the restrictive convenant in the third sentence of this letter: "The property is also subject to restrictions relative to * * * ownership by members of the Hebrew Race."

Justice Rehnquist said in his letter to Senator THURMOND: "While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week." He also said that he had asked his attorney to take the legal measures necessary to remove the restrictive covenant.

The nominee "thought" he had read the deed, but he is "quite sure" he "didn't note" the restrictive covenant. He "do(es) not doubt" that he read the letter from his attorney, but he "did not recall the letter or its contents" before his recent testimony.

I wouldn't expect anyone, even a brilliant man like Justice Rehnquist, to remember everything they read 12 years ago. But I would expect someone who is sensitive to the rights of citizens, someone who recognizes that covenants restricting property ownership on the basis of religion or race are not only "obnoxious" and "unenforceable," as the nominee has said, but completely contrary to the basic values of our society—I would expect someone sensitive to individual rights to recall seeing such an obnoxious provision in a deed on his own property, if, in fact, he saw it.

So I believe that Justice Rehnquist really might not recall the obnoxious covenant, even though he was informed about it. And that is exactly what troubles me.

Justice Rehnquist's failure to remember being informed about this covenant is part of a pattern. If this were an isolated incident, if the only negative thing anyone could say about Justice Rehnquist was that he had an unenforceable discriminatory provision in a deed on some property he owned, I would not give it a great deal of attention. I would accept the nominee's explanation that he did not remember seeing it and his offer to have it removed. But Justice Rehnquist has displayed such a consistent record of insensitivity to discriminatory practices against our citizens that I cannot ignore the fact that he totally forgot being informed about this obnoxious deed provision.

What troubles me is not that it was there. What troubles me is that he forgets being informed about it being there, although he now acknowledges that he was so informed.

How many of us in this Chamber, if we were informed of a provision in our deed similar to that one, would forget about it? We might not take any action to remove it because it is unenforceable. It may not be worth 200 bucks in a lawyer's fee to remove it because it is unenforceable.

But how many of us in this Chamber, if we were told that there was a provision in our deed as obnoxious as that one, would forget that we were told? We would be troubled. Again, we might not act to remove it, but we would be troubled.

JEHOVAH'S WITNESSES

Yes, it's all part of a pattern of insensitivity, I'm afraid.

As a clerk for Justice Jackson, he wrote a memo in which he referred to the Jehovah's Witnesses as an "outlandish group." The case involved groups of Jehovah's Witnesses in New Hampshire and Rhode Island who were convicted for making speeches in city parks in violation of local ordinances.

There were probably arguments to be made in this case on the side of the locality's right to limit certain activities in city parks, just as there were arguments in favor of the Jehovah's Witnesses' first amendment right to free speech.

I am sure, in other words, there were arguments on both sides of this case, but law clerk Rehnquist chose to characterize the appellants as an "outlandish group" whom the city had every right to prevent from "commandeer(ing) the space" and "forc(ing) their message on everyone."

Mr. Rehnquist failed to recogize that his or anyone else's opinion of whether or not the Jehovah's Witnesses are in the mainstream of American religions is irrelevant to the question of whether their right to express their views in public should be protected. As Senator SIMON said to the nominee during the recent committee hearings:

Now I recognize that neither Buddhists nor Jehovah's Witnesses are particularly popular groups in our country, but I think it is important that we defend the liberties of the most isolated, unpopular groups. (Transcript, p. 239.)

At the hearing, Justice Rehnquist said he agreed with this statement. I would find his agreement more credible if the Jehovah's Witnesses memo

were an isolated incident. But again, it is part of a pattern, a common current running through his statements and writings.

Justice Rehnquist himself recognizes this common current. In an interview with the New York Times magazine which appeared on March 3, 1985, he stated:

I can remember arguments we would get in as law clerks in the early '50's. And I don't know that my views have changed much from that time.

THE "NEW BARBARIANS" SPEECH

On May 1, 1969, Mr. Rehnquist delivered a speech in honor of "Law Day" entitled "The Law: Under Attack From the New Barbarians." The "new barbarians" referred to in the title—and described that way repeatedly throughout the speech—were members of various protest movements. Mr. Rehnquist did not identify which specific protest groups he meant. Although it appears from the content of the speech that he was thinking primarily of Vietnam war protesters, he refers generically to "protest movements," so we must assume that he includes the civil rights movement, the women's movement, and any other protest movements active in 1969.

Mr. Rehnquist said at the outset that those he referred to as the "new barbarians," "represent only a small minority of the numbers participating in these movements." But he proceeded to expound on the theory of civil disobedience in general, and made a number of sweeping statements applying to all protesters or practitioners of civil disobedience. His discussion of civil disobedience was at best tendentious and incomplete. At worst, it was a gross distortion, and yet another example of his tendency to subordinate individual rights to the "rule of the majority."

To get some perspective on what we mean when we talk about "civil disobedience," let me quote briefly from the "Dictionary of the History of Ideas."

The concept of civil disobedience * * * has a long and notable history, appearing already as the Antigone theme in Greek drama and in the anti-war motif of Lysistrata, where the women, in addition to deserting their men, seize the Acropolis and the Treasury of Athens. The conflict between civil law and conscience was sharply featured when the Jews passively resisted the introduction of icons into Jerusalem by Pilate, procurator of Judea, and by Jesus in his dramatic purification of the temple, when he overturned the tables of the money changers and the seats of those who legally sold pigeons. The conflict has been highlighted in the history of English-speaking countries many times, though rarely more forcefully than when Milton refused to obey the licensing and censorship laws of seventeenth-century England and when the Abolitionists attacked the institution of slavery in nineteenth-century America. The most widely known cases of the conflict in the twentieth century are Gandhi's campaigns against colonial rule in South Africa and India, passive resistance campaigns against Nazi occupation governments during World War II, and the civil rights campaign against segregation in the United States starting in 1954. Civil disobedience attitudes and techniques also spread into attacks against the Vietnam War, draft laws, poverty, and the authoritarian structure of colleges and universities in the 1960's. (*Dictionary of the History of Ideas*, vol. 1, pp. 434-435).

Justice Rehnquist's analysis of civil disobedience in his speech completely lacked this balanced historical perspective. After identifying the danger from the "barbarians of the New Left," who "have taken full advantage of their minority right" to advocate their views, he went on to the more general question of "what obligation is owed by the minority to obey a duly enacted law which it has opposed."

This is what he wrote:

From the point of view of the majority, and of the nation as a whole, the answer is a simple one: the minority, no matter how disaffected or disenchanted, owes an unqualified obligation to obey a duly enacted law.

This was only the beginning of Mr. Rehnquist's harsh attack on civil disobedience. A sampling of some of his other comments follow:

The deliberate law breaker does not fully atone for his disobedience when he serves his sentence, for he has by example undermined respect for the legal system itself.

* * * there is a certain amount of arrogance in insisting that one's own personal predilections will not permit him to obey a law which has been duly passed by the legislative authority having jurisdiction over him * * * it is, by implication, a privilege reserved to those with articulate and hyperactive consciences. The claim for conscientious disobedience is at war with the basic premise of majority rule.

* * * disobedience cannot be tolerated, whether it be violent or nonviolent disobedience.

There are many problems with Mr. Rehnquist's analysis. First, it failed to recognize any justification for even nonviolent civil disobedience. This is incredible in light of the success of the civil rights movement's nonviolent civil disobedience tactics only a few years prior to this speech. The only historical example of "disobedience to law" he gives is the Southern States' secession in 1861 which precipitated the Civil War. It is stretching the meaning of the phrase pretty far to describe the act of secession from the Union as "civil disobedience," and it is the height of irony—and inappropriateness—that Mr. Rehnquist put into the same category the civil rights protesters of the 1960's and the slaveholding States of the 1860's.

Second, he lumped together violent and nonviolent protesters as equally reprehensible. "To deplore only violence," he said, "obscures the fact that the law must be enforced against all those who disobey it, regardless of the means by which such disobedience is accomplished." A vastly different view of nonviolent protest can be found in the writings of Dr. Martin Luther King, Jr., who wrote:

The principle of nonviolent resistance seeks to reconcile the truths of two opposites—acquiescence and violence—while avoiding the extremes and immoralities of both. The nonviolent resister agrees with the person who acquiesces that one should not be physically aggressive toward his opponent; but he balances the equation by agreeing with the person of violence that evil must be resisted. He avoids the nonresistance of the former and violent resistance of the latter. With nonviolent resistance, no individual or group need submit to any wrong, nor need anyone resort to violence in order to right a wrong.

On the other hand, Mr. Rehnquist presented the view that disobedience, whatever its nature "cannot be tolerated." It cannot be tolerated, according to him, because it violates a law duly enacted by the majority of citizens. And remember that, according to him, "the minority * * * owes an unqualified obligation to obey a duly enacted law."

Third, he fails to make any distinction between violating the law as a form of protest against some other law or policy, and violating a law to test that law. In other words, he does not make a distinction between lying down in front of buses to protect the foreign military involvement of the U.S. Government, and refusing to sit in the back of a bus to protest the law that unjustly discriminates against black people by requiring them to sit in the back of the bus. I find his failure to make this distinction extremely troubling. Because it is precisely this second kind of civil disobedience that often results in Supreme Court or Federal appeals court cases.

A black family in Topeka, KS sends their daughter to an all-white, segregated school, insisting on her right to an equal educational opportunity. The case reaches the Supreme Court and results in the landmark Brown decision that "separate but equal" education is not constitutional. The Browns violated a law in order to test that law's constitutionality. That law had been duly enacted by representatives elected by the majority of citizens. Yet by Mr. Rehnquist's standards, the Browns had "an unqualified obligation to obey" the law, no matter how unjust they might have thought it to be.

Justice Abe Fortas saw it differently. In 1968, he wrote, referring to the civil rights movement:

This is civil disobedience in a great tradition. It is peaceful, nonviolent disobedience of laws which are themselves unjust and which the protecter challenges as invalid and unconstitutional * * * the experience of these past few years shows, more vividly than any other episode in our history, how effective these alternatives are. ("Concerning Dissent and Civil Disobedience," pp. 34 and 64.)

The "Law Day" speech is disturbing in both its spirit and its content. Barely 1 year after Martin Luther King was assassinated for his nonviolent resistance to obnoxious laws, Mr. Rehnquist described those who choose civil disobedience as "arrogant" and having "hyperactive consciences." I find it hard to conceive that he would not have understood the implications of his words.

And, as I have already shown, he failed to distinguish between violent and nonviolent resistance to law or between violating a particular law to test that law and violating the law as a more general form of protest.

The content of this speech is further evidence of a thread running through the nominee's thought: That the rights of the minority are ultimately dependent on what the majority decides. The spirit of this speech is further evidence of another pattern—the pattern of insensitivity.

CONCLUSION

In conclusion, Mr. President, in a celebration of "I Am an American Day" in Central Park on May 21, 1944, Judge Learned Hand expounded on the meaning of "the spirit of liberty":

I cannot define it, I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias * * *.

The single judge in the United States with the most power over the lives of individuals is the Chief Justice of the U.S. Supreme Court. The protection of the constitutional rights and liberties of individual American citizens lies in his or her hands, more than any earthly judge.

I am sorry to say that I don't think his nominee "seeks to understand the minds of other men and women."

I have studied Justice Rehnquist's qualifications carefully. I have looked long and hard at his past statements and actions. I have found that at times his ideological fervor has distorted his judgment and objectivity.

Where I had hoped to find candor, I too often found evasion.

Where I had hoped to find wisdom, I too often found word games and hairsplitting.

Where I had hoped to find growth, I too often found unceasing rigidity.

And where I had hoped to find compassion, I too often found intolerance and insensitivity.

I will vote against his confirmation as Chief Justice, hoping, nevertheless, that if he is confirmed, history proves me wrong, and that the term of Chief Justice Rehnquist is one where the justice promised all our people in the Constitution comes ever closer to fruition.

(Mr. CHAFEE assumed the chair.)

□ 1410

Mr. President, I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HART. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HART. Mr. President, for just the 16th time in history, we will most likely confirm a nominee to serve as the Chief Justice of the United States. The leader of the Nation's highest court. The head of the third branch of Government. The symbol in principle and the guardian in practice of the American system of equal justice for all.

Our decision is much like weighing right and wrong on the scales of justice. We must ask how much deference is to be paid the President's choice, how much weight we accord Justice Rehnquist's legal acumen. But the answers must be counter-balanced against the nominee's record, his testimony, his candor and, yes, his philosophy.

By this measure, the scales of justice are tipped sharply out of balance.

The relevant record includes the Judiciary Committee record—his memoranda to Justice Jackson endorsing the Plessy decision, his writings against the public accomodations and desegregation ordinances in Phoenix; his polemic against equal rights for women, and his ceaseless search for precedent, however vague, to marshall the power of government against the rights of the individual.

This is the record, the record in its entirety, by which we must judge this nomination. We cannot, as some have suggested, cramp the position to fit the individual. We have to see whether the nominee fits the position.

And on this basis, what do we see?

We see a man who not only did not join the civil rights movement, but, further a man whose soul was immobilized when the walls of segregation were being shaken. We see a private citizen and public servant who actively and aggressively opposed progress toward civil rights and equal justice under the law.

It was not simply that he opposed the rights of black men and women to exercise their franchise, although that in itself is wrong. Associate Justice Rehnquist opposed the rights of blacks to eat a hamburger at an integrated lunch counter. He opposed the rights of black children to get a decent education in an integrated school. He opposed the rights of defendants to have their trials heard by integrated juries.

It is a continuing record that suggests an incapacity to oppose a single barrier to racial justice; to find it indecent, incompatible with our Constitution, or inconsistent with the rights of man.

It is a record that bespeaks a nostalgia for the times when defendants could be coerced into participating in their own prosecution. A nostalgia for the time women were left subservient in the home and left out at the workplace. Nostalgia for a time when black, Hispanic, and Asian Americans were expected not to assert their rights but to avert their eyes and humble themselves before the majority.

In sum, we see a picture of a man unable to accept the progressive tides in our society to break down the walls of injustice. Not only has his thinking stood still, but he seems caught up in bitter reflections—some call them brilliant—undiminished even as tolerance and justice have grown in our society.

I would like to focus on Justice Rehnquist's involvement as Mr. Rehnquist in forming the policy of military surveillance of Vietnam war protesters and civil rights activists. This was an episode that the Church committee, on which I served, examined in 1975 and 1976. I am sure that the other two remaining veterans of the committee, Senator MATHIAS and Senator GOLDWATER, remember this inquiry as well. I was saddened, I guess that is the proper word, that Justice Rehnquist stated during the recent hearings—and stated repeatedly—that he could not recall his role as a public servant at that time.

This is far too important an issue for any "I don't recall" defense. At issue is Justice Rehnquist's candor, his decision to evade in the face of real conflicts of interest, and his role in disposing of a serious constitutional question in a case where his involvement was a salient factual question. Let me detail the facts.

When the Nixon administration came to power, the Office of Legal Counsel structured a concordant between the Departments of Justice and Defense on domestic surveillance. Justice Rehnquist ran the office at the time. Representing the Army was then General Counsel Robert Jordan. His files contain strong evidence of Mr. Rehnquist's role in formulating this policy of spying on American dissenters.

There was a time when Mr. Rehnquist remembered all this as well. He testified before Senator Ervin, in 1971, that the Army had ceased its domestic intelligence program. He testified that the computerized listing of dissenters was defunct. He said that information gathered by the Army had not been transferred to the Justice Department. And he told Senator Ervin that the one printout from the Army's computers was soon to be destroyed.

But he was not only familiar with the facts. He had reached an opinion about whether this program conformed to the Constitution.

An exchange between Justice Rehnquist and Senator Ervin is particularly telling in this regard:

Senator ERVIN. Don't you think a serious constitutional question arises where any government agency undertakes to place people under surveillance for exercising their First Amendment rights?

Mr. REHNQUIST. I am inclined to think not, as I said last week. This practice is undesirable and should be condemned vigorously, but I do not believe it violated the particular constitutional rights of the individuals who are surveyed.

Senator ERVIN. Do you not concede that government could very effectively stifle the exercise of first amendment freedoms by placing people who exercise those freedoms under surveillance?

Mr. REHNQUIST. No, I don't think so, Senator * * *

Senator ERVIN. Well there is also evidence here of photographers having been present at many rallies. Army intelligence agents pretending to be photographers were present at many rallies, took pictures of people, and then made inquiries to identify these people and made dossiers of them. Do you think that is an interference with constitutional rights?

Mr. Rehnquist. I do not, Senator * * * I don't think the gathering but itself, so long as it is a public activity, is one of constitutional statute.

And Justice Rehnquist conclusion:

My point of disagreement with you is to say whether in the case of Tatum vs. Laird that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the government.

This episode might be ancient history but for a couple of relevant facts. The military surveillance program was being challenged in court. In a few short months, Mr. Rehnquist was to be nominated to the Supreme Court. He testified months before the Court of Appeals ruled the plaintiffs in the case and standing to sue. Yet, Justice Rehnquist did not recuse himself—he cast the tie-breaking vote.

One witness before the Judiciary Committee likened the Rehnquist role as follows. It was as if Billy Martin had managed the Yankees into the sixth game of the World Series and then got himself appointed umpire. In sports, that would be considered highly questionable, to say the least. In constitutional law, that's an outrage.

The Supreme Court held the claim of Tatum et al. of a subjective "chill" of their exercise of constitutionally protected rights could not "substitute for a claim of specific present objective harm or a threat of specific future harm." [408 U.S. at 13-14.]

Chief Justice Burger wrote the majority opinion. Justice Rehnquist and three other justices joined to form the majority. The case was thus decided 5 to 4. The plaintiffs asked that Rehnquist recuse himself from voting. He chose not to do so. Had Justice Rehnquist recused himself, the 2-1 decision of the U.S. Court of Appeals would have been affirmed by a 4-to-4 vote.

Justice Rehnquist wrote a memo defending his participation in the case which was subsequently published in the Supreme Court Reporter. He claimed that his Ervin testimony did not get to the merits of the particular case; that the existing canons did not require his recusal; and that he should have participated to avoid a 4-4 result.

In his book, Appearance of Justice, John MacKenzie states that Justice Rehnquist should have disqualified himself in Laird versus Tatum and commented on his characterization of his testimony before the Ervin committee as follows:

Justice Rehnquist called this exchange "a discussion of the applicable law." But this, as all lawyers will recognize and most lawyers will freely state, is not a mere discussion of the "applicable law." It is a statement of how the law should be applied to a particular case.

□ 1420

Had Laird been affirmed, the case would have proceeded to discovery. Rehnquist's involvement in the Army surveillance plan would have been revealed, as it was not at that time. Mr. Rehnquist would likely have been deposed by plaintiff's counsel. Depending upon what the facts were, Rehnquist could actually have been a defendant and been sued for damages.

As NYU Law Professor Stephen Gillers wrote in a letter to Senator METZENBAUM:

By assuring with his swing vote that the case would go no further, Justice Rehnquist also assured that his participation in the creation of the challenged would go undiscovered and that he would avoid exposure to civil liability. [Gillers at p. 4.]

The Senate Judiciary members who voted against the Rehnquist nomination, and other outside experts, concluded, in the words of Senator KENNEDY's dissenting views: "In Laird versus Tatum, Rehnquist was a committed advocate, not an impartial judge." As such, Mr. Rehnquist's—Mr. Justice Rehnquist's—participation in this decision violated this ethical responsibility to recuse himself from this case.

At the time the case was decided, the canons of the American Bar Association stated:

A judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

A note in the Columbia Law Review [Volume 73:106, January 1973] concludes that Mr. Justice Rehnquist's participation in the case may have violated Canons 2 and 3 of the ABA Code. His participation was also contrary to a holding by the Supreme Court in *Commonwealth Coatings Corp.* (1968) which stated "any tribunal permitted by law to hear cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

But Mr. Rehnquist—Mr. Justice Rehnquist—failed to meet that standard. And justice faltered at a time when justice was sorely needed.

CONCLUSION

Mr. President, perhaps some of my colleagues have grown weary of the succession of nomination battles. Perhaps the passage of time and a significant measure of racial progress make the civil rights battles seem like old battles long since won. And I know that the votes are already counted, and that a number of my colleagues would be just as happy to move on to issues where the odds of prevailing are better.

But this is not a debate about calculating odds, it is a debate about simple justice.

When I came to this city fresh from law school, it was my honor to be employed at the Department of Justice. Each day on the way to work, I walked beneath a portal on which the words were etched: "The place of justice is a hallowed place." I believed that then; I believed it even more today.

As I read the Constitution, I do not believe that when the Founders penned the words "Advice and Consent," Senators were meant to foreclose dissent. As de Tocqueville wrote, "The Supreme Court is placed higher than any known tribunal." And I do not believe the nominee, Mr. Justice Rehnquist, meets the standard for leading this preeminent institution that guards the liberty of our people.

Mr. Justice Rehnquist should not be confirmed as the Chief Justice of the Supreme Court of the United States, the symbol of justice in our Nation.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

□ 1430

Mr. THURMOND. Mr. President, I suggest further proceedings under the quorum be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from South Carolina.

Mr. THURMOND. Mr. President, there has been some question raised concerning the Cornell family trust, and I thought I might go into that a little bit.

It has been said that Justice Rehnquist acted unethically in setting up a trust account in 1961 for his brother-in-law Harold Dickerson Cornell, who had been diagnosed as having multiple sclerosis. The trust account was established by Harold Cornell's father, Dr. Harold Davis Cornell, for the express purpose of providing for Harold Cornell, when his disease made it impossible for him to provide for himself. A trust fund in the amount of $25,000 was established for Harold Cornell and was to be administered by his brother, George Cornell.

It should be noted that at no time does Harold Cornell assert that Justice Rehnquist or anyone else took any money from the trust fund. Although George Cornell never disclosed the existence of the trust to his brother, Harold Cornell, he did provide money from his own personal funds for Harold's use. The trust fund was never utilized for this purpose and remained totally intact.

The FBI was requested to thoroughly investigate this matter, and submit a report to the committee. This report was available to members of the committee for review prior to the committee vote on the nomination. The claim by Mr. Harold Cornell of unethical behavior on the part of Justice Rehnquist apparently involves nothing more than a longstanding family dispute by an alienated family member.

Dr. Cornell insisted that Justice Rehnquist prepare the trust in order to save money and maintain confidentiality by keeping the matter in the family. Justice Rehnquist finally acquiesced only as a favor to Dr. Cornell. It is important to note here that it was the express wish of Dr. Cornell that the trust be kept secret from his son, Harold Cornell, in an effort to keep him from invading the trust and spending all the funds therein.

The code of professional responsibility makes clear that, where the testator or settlor initiates the request and is aware of a potential interest by an attorney, there is no ethical problem with the attorney assisting in preparation of the trust or will. Indeed, Justice Rehnquist's conduct was consistent even with the nonbinding ethical considerations in the code. Harold Cornell complains that Justice Rehnquist did not tell him of the trust. But his siblings unanimously make it clear that this is exactly the way Dr. Cornell wanted it in order to protect his son, Harold Cornell. It was Dr. Cornell's well-founded fear that if Harold Cornell knew of the trust he would spend the money before it was needed for his final medical care. Finally, it was not the responsibility of Justice Rehnquist to administer the trust and provide for its beneficiaries. In this case, Dr. Cornell's son, George, was the trustee and therefore responsible. Justice Rehnquist had nothing to do with its administration.

So I hope this clears up the matter about the Cornell trust.

Mr. President, another allegation brought up was that Justice Rehnquist is a lone dissenter.

There has been a generalized allegation that Justice Rehnquist is out of the mainstream of constitutional thought. A qualitative and analytical review of his record on the Court will demonstrate that this indeed is not the case.

Justice Stevens remains by far the greatest lone dissenter on the current Court with 27 solo dissents over the last four terms of the Court.

To claim that Justice Rehnquist is too far out of the mainstream, is a striking misperception of the thinking of the present Court. Justice Rehnquist has proven himself a leader of majorities, one who believes in equal justice for all, and there is no reason to think he will not continue to do so as Chief Justice.

Another question has been raised about restrictive covenants.

Issue has been taken with the fact that properties, formerly and currently owned by Justice Rehnquist, had covenants which prohibited the sale or transfer of these properties to individuals of certain racial, ethnic or religious origin. The pertinence of raising this issue is negligible at best; however, Justice Rehnquist's opponents were attempting to demonstrate his lack of sensitivity to these individuals. This is not a valid issue, since such covenants in the early part of this century were a common occurrence. It is also important to note that under current law there is no requirement to have these covenants removed, since they are unenforceable and meaningless on their face. The covenants on Justice Rehnquist's former property in Arizona and his current summer residence in Vermont date back to the 1920's. The restrictive covenant which appeared on Justice Rehnquist's Arizona property deed was known by the Judiciary Committee prior to the hearing in 1971 on his nomination to be Associate Justice. At that time it appropriately was not made an issue.

Another matter has come up concerning Justice Jackson's memorandum.

There has also been an allegation that Justice Rehnquist was not candid with the Judiciary Committee in 1971 concerning a memorandum he wrote as a law clerk for Justice Robert H. Jackson in 1952. The memorandum was entitled: "A Random Thought on the Segregation Cases," and was written at the time the Supreme Court was considering Brown versus Board of Education.

Mr. KENNEDY. Will the Senator from South Carolina yield for a point of information?

Mr. THURMOND. I will when I finish my statement.

Mr. KENNEDY. It was just one specific comment.

Mr. THURMOND. I will be glad to as soon as I finish this point.

His critics contend that the memorandum was actually a statement of his views and not the views of Justice Jackson. However, in a December 8, 1971, letter to Senator Eastland, Justice Rehnquist stated in part:

As best I can reconstruct the circumstances after some nineteen years, the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views at the conference of the justices, rather than as a statement of my views.

At some time during the October term, 1952, when the school desegregation cases were pending before the supreme court, I recall Justice Jackson asking me to assist him in developing arguments which he might use in conference when the cases were discussed. He expressed concern that the conference should have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality. In carrying out this assignment, I recall assembling historical material and submitting it to the justice, and I recall considerable oral discussion with him as to what type of presentation he would make when the cases came before the court conference . . .

Because of these facts, I am satisfied that the memorandum was not designed to be a statement of my views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it . . .

It is absolutely inconceivable to me that I would have prepared such a document without previous oral discussion with him and specific instructions to do so.

In closing, I would like to point out that during the hearings on my confirmation, I mentioned the supreme court's decision in Brown versus Board of Education in the context of an answer to a question concerning the binding effect of precedent. I was not asked my views on the substantive issues in the Brown case. In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the Brown decision.

Those were the words of Justice Rehnquist.

There is nothing in my opinion to indicate that the views on this memorandum were Justice Rehnquist's own views. On the contrary, all available evidence, including the recollection of his coclerk Donald Cronson, indicate that Justice Rehnquist was not writing his own views. To emphasize this, the Judiciary Committee on December 9, 1971, received a telegram from Donald Cronson. This telegram was put into the CONGRESSIONAL RECORD during Senate debate on the nomination of William Rehnquist to be an As-

sociate Justice. The telegram reads in part as follows:

* * * It is my recollection that the memorandum in question is my work at least as much as it is yours and that it was prepared in response to a request from Justice Jackson to prepare such a memorandum * * *

Justice Jackson requested that a memorandum be prepared supporting the proposition that Plessy was correctly decided. The memorandum supporting Plessy was typed by you, but a great deal of its content was the result of my suggestions. A number of phrases quoted in Newsweek I can recognize as having been composed by me, and it is probable that the memorandum is more mine than yours.

Memories of events that were 19 years old in 1971, and are now 34 years old today, cannot be held to be without some divergence. However, two substantive issues concerning the memorandum are acknowledged. First, that Justice Rehnquist thought that Plessy versus Ferguson was wrong in 1952, and still does, and second, that Cronson's explanation that Justice Rehnquist was assigned to write one side of the issue makes it convincingly clear that he was not expressing his own views in this 34-year-old memorandum.

At this time, the matter appears to be irrelevant and without merit. Justice Rehnquist has served on the Supreme Court for 15 years. He has reviewed countless segregation and civil rights cases. In none of those cases has he questioned Brown versus Board of Education or suggested a return to Plessy versus Ferguson. In light of his performance as a Justice, it is hard to ascribe significance to a 34-year-old memorandum written at the request of his superior.

□ 1440

Mr. President, I ask unanimous consent to have printed in the RECORD a list of 34 cases in which Justice Rehnquist cited Brown versus Board of Education.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CASES WHERE JUSTICE REHNQUIST HAS CITED BROWN V. BOARD OF EDUCATION IN SUPPORT OF A PROPOSITION

1. *Thornburgh Governor of Pennylvania, et al.* v. *American College of Obstetricians and Gynecologists, et al.*, No. 84-495, Supreme Court of the United States, 106 S. Ct. 2169, June 11, 1986.

2. *Wygant, et al.* v. *Jackson Board of Education, et al.*, No. 84-1340, Supreme Court of the United States, 90 L. Ed. 2nd 260; 106 S. Ct. 1842, May 19, 1986.

3. *Batson* v. *Kentucky*, No. 84-6263, Supreme Court of the United States, 90 L. Ed. 2d 69; 106 S. Ct. 1717, April 30, 1986.

4. *The Lorain Journal Co., et al.* v. *Michael Milkovich, Sr.*, No. 84-1731, Supreme Court of the United States, 88 L. Ed. 2d 305; 106 S. Ct. 322, November 4, 1985.

5. *Allen* v. *Wright Er Al.*, No. 84-757, Supreme Court of the United States, 468 U.S. 737; L. Ed. 2d 556; 52 U.S.L.W. 5110; 104 S. Ct. 3315; 84-2 U.S. Tax Cas. (CCH) P9611, July 3, 1984 * * Together with No. 81-970, *Regan, Secretary of the Treasury, et al.* v. *Wright, et al.*, also on certiorari to the same court.

6. *Heckler, Secretary of Health and Human Services* v. *Mathews, et al.*, No. 82-1050, Supreme Court of the United States, 465 U.S. 728; 79 L. Ed. 2d 646; 52 U.S.L.W. 4333; 104 S. Ct. 1387; 33 Empl. Prac. Dec. (CCH) P34, 190, March 5, 1984.

7. *Rogers, et al.* v. *Lodge, et al.*, No. 80-2100, Supreme Court of the United States, 458 U.S. 613; 102 S. Ct. 3272; 73 L. Ed. 2d 1012; 50 U.S.L.W. 5041, July 1, 1982.

8. *Toll, President, University of Maryland, et al.* v. *Moreno, et al.*, No. 80-2178, Supreme Court of the United States, 458 U.S. 1; 73 L. Ed. 2d 563; 50 U.S.L.W. 4880; 102 S. Ct. 2977, June 28, 1982.

9. *Board of Education, Island Trees Union Free School District No. 26, et al.* v. *Pico, by his next friend, Pico, et al.* No. 80-2043, Supreme Court of the United States, 457 U.S. 853; 73 L. Ed. 2d 435; 102 S. Ct. 2799, June 25, 1982.

10. *Lugar* v. *Edmondson Oil Co., Inc., et al.*, 80-1730, Supreme Court of the United States, 457 U.S. 922; 73 L. Ed. 2d 482; 102 S. Ct. 2744, June 25, 1982.

11. *Fullilove, et al.* v. *Klutznick, Secretary of Commerce, et. al.*, No. 78-1007, Supreme Court of the United States, 448 U.S. 23 Empl. Prac. Dec. (CCH) P31, 026, July 2, 1980.

12. *Harris, Secretary of Health and Human Services* v. *McRae, et. al.*, No. 79-1268, Supreme Court of the United States, 448 U.S. 297, June 30, 1980; Petition for Rehearing Denied September 17, 1981.

13. *Carlson, Director, Federal Bureau of Prisons, et al.* v. *Green*, Administratrix, No. 78-1261, Supreme Court of the United States, 446 U.S. 14, April 22, 1980.

14. *Estes, et al.* v. *Metropolitan Branches of the Dallas NAACP, et al.*, No. 78-253, Supreme Court of the United States, 444 U.S. 437, January 21, 1980 * * Together with No. 78-282, *Curry, et. al.* v. *Metropolitan Branches of the Dallas NAACP, et al.;* and No. 78-283, *Brinegar, et al.* v. *Metropolitan Branches of the Dallas NAACP, et al.*, also on certiorari to the same court.

15. *Gannett Co., Inc.* v. *Depasquale, County Court Judge of Senaca County, N.Y., et al.*, No. 77-1301, Supreme Court of the United States, 443 U.S. 368, July 2, 1979, Decided.

16. *Columbus Board of Education, et al.*, v. *Penick, et al.*, No. 78-610, Supreme Court of the United States, 443 U.S. 449, July 2, 1979, Decided; Petition for Rehearing Denied October 1, 1979.

17. *Dayton Board of Education, et al.* v. *Brinkman, et al.*, No. 78-627, Supreme Court of the United States, 443 U.S. 526; July 2, 1979, Decided; Petition for Rehearing Denied October 1, 1979.

18. *Personnel Administrator of Massachusetts, et al.*, v. *Feeney*, No. 78-233, Supreme Court of the United States, 442 U.S. 256; 19 Empl. Prac. Dec. (CCH) P9240; 19 Fair Empl. Prac. Cas. (BNA) 1377, June 5, 1979.

19. *Ambach, Commissioner of Education on the State of New York, et al.* v. *Norwick, et al.*, No. 76-808, Supreme Court of the United States, 441 U.S. 68; 19 Empl. Prac. Dec. (CCH) P9122; 19 Fair Empl. Prac. Cas (BNA) 467, April 17, 1979.

20. *Regents of the University of California* v. *Bakke*, Supreme Court of the United States, 438 U.S. 165; 17 Fair Empl. Prac. Cas. (BNA) 1000; 17 Empl. Prac. Dec. (CCH) P8402, June 28, 1978.

21. *Milliken, Governor of Michigan, et al.* v. *Bradley, et al.*, No. 76-447, Supreme Court of the United States, 433 U.S. 267, June 27, 1977; as amended.

22. *Maher, Commissioner of Social Services of Connecticut* v. *Roe, et al.*, No. 75-1440, Supreme Court of the United States, 432 U.S. 464, June 20, 1977; as amended.

23. *Ingraham, et al.* v. *Wright, et al.*, No. 75-6527, Supreme Court of the United States, 430 U.S. 561, April 19, 1977; as amended.

24. *Austin Independent School District* v. *United States*, No. 76-200, Supreme Court of the United States, 429 U.S. 990, December 6, 1976.

25. *Pasadena City Board of Education, et al.* v. *Spangler, et al.*, No. 75-164, Supreme Court of the United States, 427 U.S. 424, June 28, 1976.

26. *Rizzo, Mayor of Philadelphia, et al.* v. *Goode, et al.*, No. 74-942, Supreme Court of the United States, 423 U.S. 362, January 21, 1976.

26. *Buchanan, et al.* v. *Evans, et al.*, No. 74-1418, Supreme Court of the United States, 423 U.S. 963, November 17, 1975.

28. *Milliken, Governor of Michigan, et al.* v. *Bradley, et al.*, No. 73-434, Supreme Court of the United States, 418 U.S. 717, July 25, 1974, * Decided * Together with No. 73-435, *Allen Park Public Schools, et al.* v. *Bradley, et al.*, and No. 73-436, *Grose Pointe Public School System* v. *Bradley, et al.*, also on certiorari to the same court.

29. *Gilmore, et al.* v. *City of Montgomery, Alabama et al.*, No. 172-1517, Supreme Court of the United States, 417 U.S. 556, June 17, 1974, Decided.

30. *Norwood, et al.*, v. HARRISON, ET AL., No. 72-77, Supreme Court of the United States, 414 U.S. 455, June 25, 1973, Decided.

31. *Keyes et. al.* v. *School District No. 1, Denver, Colorado, et al.*, No. 71-507, Supreme Court of the United States, 413 U.S. 189, June 21, 1973, Decided.

32. *Lemon, et. al.* v. *Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al.*, No. 71-1470, Supreme Court of the United States, 411 U.S. 192, April 2, 1973, Decided.

33. *San Antonio Independent School District, et al.* v. *Rodriguez, et al.*, No. 71-1332, Supreme Court of the United States, 411 U.S. 1, March 21, 1973, Decided.

34. *Wright, et al.* v. *Council of the City of Emporia, et al.*, No. 70-188, Supreme Court of the United States, 407 U.S. 451; 33 L. Ed. 2d 51; 92 S Ct. 2196, June 22, 1972, Decided.

Mr. THURMOND. Mr. President, this list shows not only that he favored Brown versus Board of Education but also that he cited it in 34 different decisions he wrote.

I also ask unanimous consent to have a list of cases printed in the RECORD. A question was asked: "Have you ever voted for the interests of minorities or women?" There were 27 different cases in which Justice Rehnquist voted for minorities or women.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

Question: Have you ever voted for the interests of minorities or women?

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) (Employee had made out prima facie case of racially motivated discrimination of employer).

International Brotherhood of Teamsters v. *United States*, 437 U.S. 324 (1977) (Team-

sters had discriminated against minorities in line driver positions).

Alexander v. *Gardner-Denver*, 415 U.S. 36 (1974) (Racial discrimination suit is not bound by prior arbitral decision).

Roberts v. *United States Jaycees*, 104 S. Ct. (1984) (State can apply Human Rights Act to compel all male organization to accept women).

Ham v. *South Carolina*, 409 U.S. 524 (1973) (Questioning of juror's racial attitudes required when racial issues inextricably bound up in the case).

Lau v. *Nichols*, 414 U.S. 56 3 (1974) (Discriminatory impact suffices to establish liability under Title VI) (*Bakke* and *Guardians* modified *Lau*).

Bazemore v. *Friday*, Nos. 85-93 and 85-428 (1986) (Extension service had a duty to eradicate salary disparities between white and black workers caused by pre-Act violations).

Palmore v. *Sidoti*, 466 U.S. 429 (1984) (State cannot remove child from mother who is married to a black man).

Hishon v. *King & Spaulding*, 467 U.S. 69 (1984) (Discrimination against women employees in admission to law firm partnerships states a claim under Title VII).

Meritor Savings Bank v. *Vinson*, No. 84-1979 (1986) (Hostile work environment can constitute sex discrimination in violation of Title VII).

Burlington School Committee v. *Miss.*, 53 U.S.L.W. 4509 (1985) (Allowed parents to be reimbursed for private school expenses of their handicapped child).

Irving Independent School District v. *Tatro*, 468 U.S. 883 (1984) (Construed Education of Handicap Act to include certain forms of medical treatment as being covered under the Act).

White v. *Regester*, 412 U.S. 755 (1973) (Struck down Texas at-large voting plan as unconstitutional because it would have diluted minority strength).

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) (Invalidating employment test having disproportionate impact on minorities) as insufficiently job-related).

Dothard v. *Rawlinson*, 433 U.S. 321 (1977) (Invalidating a weight and height requirement that adversely affected women) (concurrence).

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) (Plaintiffs had standing to sue owner of apartment complex, alleging that racial steering practices violated the Fair Housing Act).

United Jewish Organizations of Williamsburg v. *Carey*, 430 U.S. 144 (1977) (Constitution permits the State to draw lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county).

Hunter v. *Underwood*, 105 S. Ct. 1916 (1985) (Held that provision in Alabama Constitution disenfranchising persons convicted of crimes involving moral turpitude violated equal protection where, even though on its face it was racially neutral, original enactment was motiviated by desire to discriminate against blacks on account of race and provision had had racially discriminatory impact since its adoption).

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) (concurrence) (Female plaintiff who was denied admission to University had private cause of action under Title IX). (J. Rehnquist concurs emphasizing that the question of the existence of a private right of action is basically one of statutory construction and Congress must make plain its intent to create such a right).

Chapman v. *Meier*, 420 U.S. 1 (1975) (Reapportionment plan for voting district was constitutionally impermissible because it diluted minority voting strength).

Gilmore v. *City of Montgomery*, 417 U.S. 556 (1974) (federal court may enjoin a municipality from permitting the use of formerly segregated public park recreational facilities by private segregated school groups and by other nonschool groups that allegedly discriminate in their membership on the basis of race).

Chandler v. *Roudebush*, 425 U.S. 840 (1976) (Federal employee had same right to a trial *de novo* on discrimination as private employee).

Sumitomo Shoji America v. *Avagliano*, 457 U.S. 176 (1982) (Female secretaries of New York corporation of Japanese subsidiary could sue under Title VII).

Hills v. *Gautreaux*, 425 U.S. 284 (1976) (The *Milliken* decision, which rejected a metropolitan area school desegregation order because there was no interdistrict violation or any significant interdistrict segregative effect, imposes no per se rule that federal courts lack authority to order corrective action beyond a district boundary where the violations occurred.

United States v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972) (The district court in this litigation instituted by the United States enjoined implementation of a statute as creating a refuge for white students and promoting school segregation in the county). (Burger along with Blackmun, Powell and Rehnquist concur in order to distinguish *Wright* v. *Council City of Emporia* from *Scotland Neck*.

Tillman v. *Wheaton*, 410 U.S. 431 (1973) (Wheaton-Haven swimming pool operates as a community pool and thus could not deny membership for racial reasons).

The PRESIDING OFFICER. The distinguished majority leader.

Mr. DOLE. Mr. President, I thank the distinguished chairman of the Judiciary Committee for his untiring efforts on this nomination.

I still hope that we can vote on this nomination and the Scalia nomination and dispose of both before 4 o'clock tomorrow.

I know that this is a matter of controversy to some, but I do believe that we should bring it to a conclusion and get on with other business before the Senate, and I hope that tomorrow we can do that.

Mr. President, I support the nomination of William Hubbs Rehnquist to be Chief Justice of the United States.

This is the third occasion in which the Senate has been asked to confirm this nominee. The first occasion was in 1969, when he was nominated and confirmed to be an Assistant Attorney General of the United States. He was also confirmed to be an Associate Justice of the Supreme Court in 1971.

The nominee has emerged from more than 4 days of thorough hearings in the Committee on the Judiciary. This involved 40 hours of testimony from 40 witnesses. By now the Senate should be well acquainted with Justice Rehnquist and his background, qualifications, and experience.

Associate Justice Rehnquist brings to the position of Chief Justice a unique set of credentials. He has unequaled experience and he has the temperament and collegiality necessary to provide effective leadership on the Court.

His academic credentials are simply the best. He was first in his class at Stanford Law School. He has a masters degree in history from Harvard and an undergraduate degree from Stanford with highest honors.

He had a distinguished private practice in Phoenix for 16 years afer being a clerk to a Supreme Court justice upon graduation from law school. He served as the top lawyer in the Government for 3 years as an Assistant Attorney General and legal counsel to the Attorney General. Then he was elevated to the Supreme Court in 1971, where he has served with distinction. It is difficult to imagine anyone with a better set of credentials to be Chief Justice.

Mr. Justice Rehnquist has been one of the most productive and prolific members of the Supreme Court. He has been assigned to write more majority opinions—over 230—than any of his colleagues during his service on the High Court. He has also been one of the most frequent dissenters—oftentimes alone—having authored more than 80 dissents. Quite frequently, he spoke for others. Some have attempted to characterize these opinions as extremism. However, I cannot find fault with one who does not hesitate to express his views, even if they might be unpopular or in the minority at the time.

AMERICAN BAR ASSOCIATION ENDORSEMENT

As might be expected when a nominee has been identified for the highest judicial position in the Nation, the American Bar Association's standing committee on the Federal judiciary conducted an exhaustive examination of Justice Rehnquist.

The committee interviewed all members of the Supreme Court and found unanimous, enthusiastic support among his colleagues. The committee interviewed judges from across the Nation, almost 200 of them. Sixty-five respected leaders of the bar were also interviewed. In addition the faculty and students of Michigan Law School conducted an indepth review of Justice Rehnquist's contributions as a Justice of the High Court. The committee also interviewed more than 50 deans and faculty members from law schools across the country.

□ 1450

The committee concluded unanimously that, based on its findings, Justice Rehnquist was "well qualified" to be Chief Justice. This is the highest rating the committee can bestow on a candidate. It speaks for itself. William

Rehnquist has been found by his peers to be uniquely qualified to assume the role of the Chief Justice.

Despite this highest rating and despite a unique set of credentials, this nomination has been controversial.

VOTER INTIMIDATION

Mr. President, one of the charges against Justice Rehnquist that received much attention alleged that he engaged in voter intimidation tactics during local Phoenix elections in the early 1960's Testimony was taken from two panels of witnesses. One panel, consisting of partisan Democrats, alleged that Mr. Rehnquist engaged in various voter intimidation tactics at certain polls with heavy minority voter registration.

A second panel, consisting of former local Republican officials as well as certain Democrats heatedly denied that Mr. Rehnquist engaged in these tactics. Rather, they stated that he was chairman of a lawyer's group that was set up to train and advise Republican watchers and challengers. In that capacity he sometimes traveled to certain polls to act as a troubleshooter.

The hearing record in 1971 and again this year reveals that events occurred, probably in 1962, although one witness suggested that the most controversial event occurred in 1964 at a Hispanic precinct. Indeed, there was an incident at a predominately black precinct, Bethune School, in 1962. Police and FBI reports as well as newspaper accounts the next morning confirmed that a Republican challenger was arrested after engaging in harassing tactics against minority voters. This individual was not Mr. Rehnquist, but a person who resembled him in height and weight.

No criminal charges were brought. Yet this event was referred to by opponents of the nomination as evidence of behavior not worthy of a Supreme Court Justice. On the other hand, supporters, including former Democratic local chairmen, vigorously contended that Mr. Rehnquist did not engage in illegal or harassing tactics.

It is undeniable that the passage of years have blurred the memories and recall of those who were involved at the time. It seems to me that it is now not humanly or objectively possible to reconstruct the events as they occurred at that time.

We have Justice Rehnquist's flat denial of improper conduct. We also have the fact, as recounted by Congressman RUDD in his testimony, that Mr. Rehnquist was selected by the Democratic House of Representatives in Arizona to defend two Democrats in an impeachment proceeding in the legislature during this period. To me, this speaks eloquently for the general high regard for and reputation of Mr. Rehnquist. It is inconceivable that Mr. Rehnquist would have been chosen by the leadership of that body if he had engaged in the conduct which was alleged in this instance.

Motives that smack of partisanship and lack of objective evidence lead me to the conclusion that the nominee did not engage in unlawful or unethical conduct in the Phoenix precincts in the early sixties.

THE RESTRICTIVE CONVENANTS

Much of the controversy relating to this nomination centers around certain racially restrictive covenants found by the FBI in the deeds of two properties acquired by Justice Rehnquist many years ago. One of these properties, which was formerly the Rehnquist family home in Phoenix, was sold in 1969. The other is currently his vacation home in Vermont.

The Supreme Court in the case of *Shelley* v. *Kramer*, 334 U.S. 1 (1948), found that these totally repugnant and obnoxious provisions were unconstitutional and utterly unenforcable in any court of law in the United States. But the matter was still bandied about in the national media as somehow evidence that Justice Rehnquist was a racist or bigot and therefore unworthy to be elevated to be Chief Justice.

Mr. President, this charge is so far fetched and irresponsible that it is a great pity that we must waste the time of the Senate in response. The Supreme Court has spoken definitively—decades ago. Any real estate lawyer knows that these convenants are not worth the paper they are written on. Yet it is undoubtedly true that millions of these relics are still buried in land records in every county courthouse in the country.

When brought to his attention, Justice Rehnquist immediately expressed his shock and dismay at their existence and pledged to the Committee on the Judiciary that they would be removed promptly. However, opponents are still trying to read some kind of bias into the character of the nominee. I simply find these charges as repugnant as the racially restrictive covenants upon which they are based. I reject them out of hand and submit that the Senate and the American people will do the same.

THE JACKSON MEMORANDUM

Another charge against Mr. Justice Rehnquist relates to a memorandum he prepared while serving as a law ckerk to Justice Jackson on the Supreme Court in 1952, about 34 years ago. At the time the Court was beginning the review of the separate but equal doctrine in Plessy versus Ferguson. This review 2 years later became the unanimous opinion of the Court in the historic case of Brown versus the Board of Education.

If I correctly heard, I heard the distinguished chairman of the Judiciary Committee refer to the Brown case in fact cited by Justice Rehnquist in as many as 30-some cases.

It is clear to this Senator that clerk Rehnquist—this was back in 1952—was playing a "devil's advocate" role on that occasion. He has stated in 1971 that that memo did not then reflect his view on the matter. He has restated that same view this time around. First, some 20 years after the fact and now almost 35 years after the fact we are engaged in an exercise trying to reconstruct the mind set of those involved at the time 1952.

The issue involved is important. It seems to me that the best evidence of the nominee's view and record in segregation in the schools can be found in the 34 opinions the Court handed down since William Rehnquist has been a member of the Supreme Court. In all these cases the Brown case was upheld. In all the cases Justice Rehnquist either wrote the majority opinion or concurred in the majority opinion. These are not clerk's memos of 34 years ago. These are 34 opinions of the High Court with Justice Rehnquist leading or joining with others on the Court to reaffirm the Brown case. Is not this the best evidence of the state of mind of Mr. Justice Rehnquist as to his views on segregation in the schools? Mr. President, I submit that it is.

THE JUSTICE DEPARTMENT MEMOS

The Judiciary hearings on the Rehnquist nomination focused substantially on several memoranda written while he served as assistant attorney general. Two of these memoranda surfaced in the past few days, one on school busing and one on the ERA amendment.

Ten pages of the Judiciary Committee report are devoted to this matter and the related issue of Justice Rehnquist's participation in the subsequent case of Laird versus Tatum. The report sets forth the issues involved adequately. It also contains a memo written by Justice Rehnquist which sets forth his reasons for not recusing himself from participation in the Court's deliberations on the case.

The majority of the committee felt that this memo was the best reply to the charges on the recusal question. The committee also concluded that "in no way should Justice Rehnquist's actions be construed as being improper." A great deal of time was spent in the hearings pursuing this question. I respect the committee's conclusion; however, it must be recognized that there is merit to the opposing view. It was a close call, as Justice Rehnquist conceded.

□ 1500

With respect to the busing and ERA memos, it seems to me that these were internal memos in which the Chief Legal Advisor was asked by senior White House staff for candid opinions which presented alternative options

on two of the most highly controversial issues of the time—busing and ERA. I note that the Nixon administration did not offer a constitutional amendment on busing, but it did support the ERA amendment. Whatever views might have been contained in the memos, the fact of the matter is that Mr. Rehnquist did testify on behalf of the administration on the ERA amendment. Again, I note that his record on the Court must be the best evidence of his position on these matters.

Upon analysis of the busing memo, it is clear that it was simply a legal analysis of the proposed constitutional amendment. The White House had sole responsibility for all policy decisions on the amendment.

Any suggestion that this memo endorsed deliberate racial segregation is a gross and irresponsible misrepresentation. The legal analysis in the memo presents the view that the Constitution prohibits intentional racial discrimination, not racial imbalance resulting from the actions of private actors. Accordingly, local jurisdictions would be free to engage in race-neutral student assignment plans even if the schools are racially identifiable due to factors beyond the school board's control. This is what the Supreme Court held in three subsequent cases: Swann, Pasadena and, most recently, Bazemore (outside the public school context).

This memo was written at a time when both the executive branches were examining alternatives to forced busing to achieve racial balance in school desegregation.

The Committee on the Judiciary examined these issues quite carefully, although not specifically the memos themselves. The majority was satisfied that Justice Rehnquist has had a satisfactory record in his Court opinions on these matters. The Justice himself cited a case decided just last June when he wrote the majority opinion for the Court on women's rights.

Although not as expansive in his views over the years as some others on the Court have been on these issues, it can hardly be said that here is a bigot or a racist or a person who is insensitive and inconsiderate. The nomination should not fall on these issues.

THE CORNELL FAMILY TRUST

In recent days attempts have been made to discredit Justice Rehnquist through the criticism of his brother-in-law, Harold D. "Dick" Cornell. The charges were first aired in an article appearing in the Los Angeles Times on August 2, 1986. Chairman Thurmond asked the FBI to investigate the matter. This report was made available to members of the committee 2 days before the vote. Subsequently four Senators, including three who are members of the committee and who voted against the nomination asked Chairman Thurmond to investigate the matter further.

My staff and I have also reviewed the matter. We have reviewed the press accounts and the FBI report. It should be said that Mr. Cornell has been alienated from the rest of his brothers and sisters for sometime. The other members of the Cornell family have unanimously repudiated Mr. Cornell's allegations.

According to members of the Cornell family, they believe that his attacks on Justice Rehnquist are motivated by his intense professional jealousy of Justice Rehnquist, and not as a result of his current physical or mental illness. Mr. Cornell previously practiced law in California and described himself as a "liberal attorney."

Mr. President, the focus on this matter has simply given a public forum to a man who seems to be personally jealous and politically motivated. Whatever are the legitimate concerns with this nomination, this is not one of them. I deeply regret that members of this body have sought to legitimize them and to build opposition based on these spurious charges.

In conclusion, Mr. President, this Senator will support the nomination of William Hubbs Rehnquist to be Chief Justice of the United States. I am confident he will be a pillar of strength in his new role. I am confident he will have the capacity and compassion to lead the Court and the Federal Judiciary in the coming years. The hearing record disclosed nothing this time or previously to bar Justice Rehnquist from assuming this position of highest trust for which the President has nominated him. The Committee on the Judiciary has found that he does possess the qualities required of a Chief Justice: Unquestioned integrity, incorruptibility, fairness and courage. I agree. I shall vote for confirmation.

It seems to me that we are reaching a point that we need to make a decision. I understand the fall session of the Court is not long off, and he will be needed to guide the Court.

In my view, I think he has the sensitivity and the compassion and certainly the integrity and the intellect to be Chief Justice of the United States. I submit there is nothing in the hearing record, and there have been no bombshells over the weekend, do not anticipate any, do not know of any, and I would urge my colleagues to let us proceed with this nomination early tomorrow afternoon.

As I have indicated this morning, we have a mountain of work—a mountain of work—and we have this week and the two following weeks if we intend to leave here on October 3. We have spent about 5 days on this nomination. For the most part, we have used the time appropriately. There has been discussion, there has been a dialog, there has been a debate. But there also has been a lot of repetition.

I know some oppose the nomination; I know some will vote no. But I just suggest I hope that vote will come tomorrow, and I am willing to predict that it will be somewhere in the neighborhood of 75 to 25, 72 to 28, or somewhere in that neighborhood. And nothing has changed in the past 4 or 5 days.

So I thank the distinguished chairman of the Judiciary Committee again for his untiring efforts on behalf of the nominee and on behalf of the President. Again, I would say the President won a fairly clear mandate in 1980, which was reaffirmed in 1984. I believe the American people would expect the President, whoever he might be—Democrat of Republican, liberal or conservative—to appoint people who might reflect his philosophy, particularly in the case of an overwhelming mandate, carrying 49 States. I must believe that the President probably had that in mind. He was not elected in 49 States to pick out the most liberal member he could find to be Chief Justice. And there are a lot of very able liberal jurists in the country. There are also very many conservative jurists. Justice Rehnquist certainly is an outstanding one and I think the President made exactly the right choice.

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER (Mr. GRAMM). The Senator from Ohio.

Mr. METZENBAUM. Mr. President, you can say something once and you can say it twice and you can say it five times and some people do not hear you.

But I want my distinguished colleague, the distinguished majority leader, to understand that we agree. The President won the election. He won the election and he has appointed 275 judges and we have only raised a question with respect to 5 of them—5 out of 275.

I want to further point out that there are other conservatives in this country besides Justice Rehnquist. When Sandra Day O'Connor came up for confirmation—a very, very conservative women, fine legal background, probably every bit as conservative as Justice Rehnquist—the Senate confirmed her 99 to 0. And when Judge Scalia was up for confirmation—and some say his conservative philosophy is even more conservative than Justice Rehnquist—I might say, parenthetically, if that is possible—but be that as it may, the Senate Judiciary Committee unanimously reported out and recommended for passage Judge Scalia to become a Justice of the Supreme Court.

I have no doubt in my mind that when Judge Scalia is brought to the

floor of the Senate after we dispose of the confirmation process concerning Justice Rehnquist, I have no doubt in my mind that Judge Scalia will become Justice Scalia with a near unanimous vote.

He is a conservative. Sandra Day O'Connor is a conservative. Most of those 275 judges are conservatives. We have made an issue with respect to five of the lower court judges and one Supreme Court Justice appointee.

Now, why? Because the issue here is an issue having to do with credibility, an issue having to do with integrity.

Mr. DOLE. Will the Senator from Ohio yield?

Mr. METZENBAUM. For a question, yes.

Mr. DOLE. I do not quarrel with the statistics, but I wanted to just make the record complete and indicate that in the 4 years President Carter was President, I think this body confirmed 264 Federal judges. It has taken Ronald Reagan 6 years to catch up with the 4-year term of President Carter. And I would guess in most of those cases those were more liberal jurists.

I did vote against one, Judge Abner Mikva.

Mr. METZENBAUM. You have made my point, and that is that the U.S. Senate, whether it is dealing with liberals or conservatives or moderates, or Democrats or Republicans, has not voted on the basis of whether the appointee was a liberal or conservative.

I do not know about President Carter's appointees, whether they were liberals. But let us accept the fact that in the main they were Democrats and let us also accept the fact that most of them were confirmed without controversy.

Let me also make the point that the distinguished chairman of the Judiciary Committee led the opposition to the confirmation of Abe Fortas on the basis of his political philosophy—led the opposition on that basis and spoke to the issue for hours on end to the point where the appointment had to be taken down. There were not enough votes in order to invoke cloture.

But none of us, there is not a single person that I know who stood on the floor of the U.S. Senate and said, "We oppose Justice Rehnquist to become Chief Justice of the Supreme Court because he is too conservative."

Judge Scalia is every bit as conservative. We had testimony saying he is far more conservative than Justice Rehnquist. That is not the issue.

□ 1510

And when you talk about five witnesses saying one thing and seven witnesses saying another thing, that is not the issue either. We are not dealing with numbers. We are dealing with what people were saying. The seven witnesses were testifying concerning the fact that they did not know whether or not Mr. Rehnquist was involved in voter challenges and intimidating of voters; they did not know. They said it was not possible for them to know with certainty; they were not with him all day. The five witnesses said they saw, they identified him.

Again, I want to report that which I said the other day: That is not the issue—whether he did or did not. The issue is what did he say to the U.S. Senate in his confirmation process. We know what he said. He denied harassing. He denied intimidating. The issue has to do with his candor, with his integrity, with his truthfulness in 1971 and again in 1986. If there had been only one question concerning his credibility or his integrity, I know I would not be on the floor speaking for the second time in connection with this appointment. But no. When you look at the facts with respect to the Justice Jackson memo, it is not what he said. He had a right to have his opinion. It is what he said to the U.S. Senate in his confirmation process.

The evidence indicates clearly that he wrote the memo. He can say anything he wants. But any single human being who understands the English language can read that memo. It is in the Record. If it is not here in the Record I will now check that fact and be certain to put it in the Record before we go to a vote.

There is no argument. It is his memo. It is signed W.H.R., William H. Rehnquist. Right above his name, right above his signature, his initials, is the indication with respect to his position concerning Plessy against Ferguson indicating that case made good law. He had a right to say that.

When he spoke to the U.S. Senate in 1971 by affidavit, he told them that was not his position. He did a 100 percent reversal. That is bad enough. But when one of the members of our Judiciary Committee asked him what his position was he said, "I did not have a position"—did not have a position. Come now, does anybody really believe that?

The distinguished floor leader spoke a few minutes ago about the restrictive covenant. The issue there again is not the matter of the restrictive convenant and whether or not he bought a piece of property with a restrictive convenant in it—as a matter of fact, two pieces of property with restrictive convenants. That is not the issue.

The issue is that he told the U.S. Senate he did not know about it. He said he just learned about it a few days earlier when he read the FBI report.

What are the facts? The facts are that he was advised by two lawyers to take a look at the restrictive convenant. He did not tell us about that at the hearing. The only time he told the Judiciary Committee about that was after the Washington Legal Times spoke with the two attorneys, and they said, "Yes, indeed, we did advise them about the restrictive convenant."

What an unbelievable coincidence. The very day that the Legal Times publishes that information as to the lawyers having advised him on the facts, what then happens? It is on that day—not a day before, not a week after—that very day that it is published here in Washington, Justice Rehnquist writes a letter to the chairman of the committee and says, "In rummaging through my papers, I found that I did have letters from my legal counsel on that subject."

Then if that were not enough, this whole question of integrity, we have the ethical question, where the chairman of the American Bar Association Committee on Legal Ethics concludes that the conduct of the Justice of the Supreme Court who is to become the Chief Justice was unethical.

Other professors, 90 of them to be exact, conclude that the conduct of his was not ethical in the Laird against Tatum case. There has been much talk about the Laird against Tatum case. That is the case you will recollect where during the Nixon administration the military was involved in surveillance of civilians in this country to find out what they were doing in connection with their protests, much of which evolved around the Vietnam war. Justice Rehnquist tells the committee, no, he did very little on that. He responds to Senator LEAHY and then on another occasion to Senator MATHIAS that he knew very little about that subject. He had written one little memo or something, he said in answer to Senator LEAHY. Then more information comes out about his actual involvement and what he really did. Senator MATHIAS asks him a series of questions. What does he say? "I can't recollect."

"I do not recollect."

We are not talking about a situation where somebody is asking what did you do on October 20, 1946, at 8 p.m. Of course that is not the kind of thing we are talking about. We are talking about one of the most important issues that has occurred in this century concerning our Government's conduct, use of the military in order to spy upon civilians conducting themselves in peaceful activities and indicating their protests. This Government was founded on the basis that people had a right to speak out, and people had a right to have different opinions, and people had a right to express those opinions. Yes, people had a right to do those things without being spied upon.

Judge William Rehnquist, as a lawyer in the Department of Justice was totally involved, tells Senator MA-

THIAS he cannot remember. "I do not recollect." "I do not recollect." "I do not recollect." "I do not recollect."

Any of us who have practiced law know that lawyers oftentimes speak with those who are about to be witnesses in cases, and make it very clear to them that when you are on the witness stand, if you are in a sticky wicket, and the problem is great, that nobody, nobody can say to you, or tell you what is in your own head, and what your memory is. And "I cannot recollect" is the standard and traditional out that is used by so many witnesses.

It is not an appropriate procedure for lawyers, and certainly not an appropriate procedure for a Supreme Court Justice about to become a Chief Justice of the United States.

What does it say to the American people if we are going to confirm a man solely on a partisan basis because the President of the United States wants it? I say to my colleagues on the other side, I am waiting for one of you who is staunch enough, strong enough, and courageous enough to say to your President, enough is enough, Mr. President. Enough is enough. We will vote for your Manions, your Fitzwaters, and your Sessions and some of the others that you have sent us. That is bad enough. And we will support you, Mr. President, when you send us decent conservatives who have impeccable records. But that does not mean, Mr. President, that we have to stand in line and salute every time you ask us to do so. We will not go along with the Rehnquist nomination.

What brave soul is going to stand up and speak out on that subject? Is it possible that the Democrats on this side of the aisle are split on the issue and some think Rehnquist should be confirmed and some think he should not? That is probably as it should be. At least it indicates an independent judgment.

It certainly does not indicate a political posture.

On that side of the aisle I have yet to hear one courageous soul say, Mr. President, I have had enough. I cannot stomach the Rehnquist nomination.

No. Instead, I am willing to appoint someone to be Chief Justice of the United States notwithstanding I know that he will only serve to polarize that Court. He will only serve to bring to it a contentiousness that has not existed under the previous Chief Justice.

We are talking about a man who has an open and understood opposition and hostility to a basic constitutional value.

I would like to talk about some of those constitutional values because to me what is this Constitution all about if we are not prepared to stand up, defend it, and defend it at times when it is not easy to do so?

I remember so well when the Kefauver committee was conducting its hearings having to do with the gangs of this country. I remember so many persons who appeared before that committee, and said "I like the fifth amendment." I remember so many in this country wanted to change the Constitution, eliminate the fifth amendment because too many were hiding behind that cloak.

□ 1520

But the strength of this Nation relates to that Constitution and the fact that it is a strong Constitution, a Constitution for all the people of this country no matter what the circumstances are, a Constitution behind which, on some occasions, people can hide, but those constitutional values are more important than invading the Constitution itself.

I am not at all certain that this new Chief Justice if and when he is confirmed will have that same approach to defending the Constitution. The fact is that of all the persons qualified for the Supreme Court, the President has chosen one of those most hostile to basic individual rights.

When Justice Rehnquist was an Assistant Attorney General in the Justice Department, he drafted a constitutional amendment which would have immunized all but the most blatant racial school segregation.

This constitutional amendment if adopted would have nullified the Supreme Court decision in Brown against Board of Education. The amendment would have overruled Supreme Court decisions which required full desegregation. These Supreme Court decisions rejected desegregation plans which were adopted to avoid desegregation, and plans which had the effect of thwarting desegregation.

But the Rehnquist amendment was written to give both the North and the South the opportunity to maintain segregated schools.

According to the Rehnquist memo, a school board could set up an attendance plan that would keep its schools segregated even if the plan had been adopted to maintain segregation. The memo states:

> If the zoning plan adopted bears a reasonable relationship to education needs—if fair-minded school board members could have selected it for nonracial reasons—it is valid regardless of the intent with which a particular school board may have chosen it.

Let me repeat that. This is from Justice Rehnquist when he was in the Department of Justice. His memo would provide:

> If fair-minded school board members could have selected it for nonracial reasons, it is valid regardless of the intent with which a particular school board may have chosen it.

The Rehnquist amendment would have permitted a school board to zone its schools with the intent to keep them segregated. As long as the court could imagine a nonracial reason for the zoning plan, there would be no constitutional violation under the Rehnquist amendment. And the amendment would have permitted school boards to let students choose their schools. Assistant Attorney General Rehnquist would have let them choose even when the freedom-of-choice plan was adopted to thwart desegregation efforts.

Assistant Attorney General Rehnquist would let them choose even when the evidence showed that blacks had no choices because of violence and threats of violence. In other words, such a plan would be great, according to Justice Rehnquist, even if it were a sham.

The 14th amendment has long been controversial, but at the time Assistant Attorney General Rehnquist wrote his memo some things were very clear. It was clear then that the 14th amendment outlawed new and more sophisticated forms of discrimination. It was clear then that school boards would not be able to evade the mandate of Brown through blatant or disingenuous subterfuge. It was clear that after a history of deliberate segregation, the mere adoption of a paper policy of equality would not satisfy the 14th amendment.

It was clear then that only meaningful desegregation would satisfy the Constitution.

Our Justice Rehnquist then was working in the Department of Justice. That William Rehnquist wanted to undo these principles. Is that the kind of man that the people of this country can have confidence in that he would be fair to all people regardless of their color, their ethnic or national origin?

William Rehnquist as a lawyer wanted to turn back the hands of time to the era of Jim Crow and he wanted to do that in 1970.

But in all candor, while I am outraged by this memorandum, I do not think anyone is surprised at all.

A few days ago a spokesperson for the Justice Department was asked about the memo. He said, "I do not see much that is new in this."

Well, I must say that I agree with the Justice Department this time. There really is not much that is new in this. After all, it was law clerk Rehnquist who supported Plessy versus Ferguson when he wrote the Brown versus Board memo for Justice Jackson. And, after all, it was Phoenix lawyer Rehnquist who opposed the desegregation of the Phoenix schools, and, after all, it is Justice Rehnquist who dissents from every major decision which would make the Brown desegregation requirement a meaningful one.

How can we possibly, I say to my colleagues who are prepared to vote for this nomination, confirm someone to this post who has so consistently opposed equality under the Constitution?

This proposed constitutional amendment is just one more reason why Justice Rehnquist should not be confirmed as Chief Justice.

Now we have also learned that Justice Rehnquist authored in 1970 a memorandum on the equal rights amendment when he was an Assistant Attorney General. He did it for the Office of Legal Counsel. He was asked to summarize the objections to the adoption of the ERA. He responded in memorandums which show he had a very firm view that women should not be accorded equality under the Constitution.

I am not talking about this memo because he opposed the ERA. The issue is not whether he favored or opposed the ERA.

The issue is his views about basic protection women should have under the Constitution.

This memo shows that the Assistant Attorney General did not think the Constitution should accord males and females equal treatment. That was his view in 1970. It has been his view on the Court ever since.

What did Mr. Rehnquist object to? I will tell you. He was concerned that the age to marry might be equalized. He was worried that the age when men and women can begin work might be equalized. He was concerned that the entitlement of male and female children to parental support might be equalized. He was concerned that husbands and wives might have equal power to decide where the family would live.

He felt certain that the 14th amendment would not require this kind of equality, but he said that ERA might be interpreted to require it.

What kind of approach is this for the Chief Justice of the Supreme Court to somehow think that women are second-class citizens, young and old?

Assistant Attorney General Rehnquist said the majority of women did not want these kinds of changes, that those supporting ERA were equality fanatics.

Let me quote Mr. Justice Rehnquist at that time:

> . . . But I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the women's traditionally different role in this regard.

What bothers me, what concerns me about this man, Mr. President, for whom so many are going to vote to become Chief Justice, is his outlook that constitutional equality is fanatical, that seeking legal equality means eliminating physical distinctions. That is an absurd way to characterize women's search for equal protection under the law.

How can the women of this country feel comfortable in knowing that the Chief Justice of the Supreme Court thinks that their desire for full equality is fanatical, thinks that there is something improper, inappropriate, in their seeking that kind of full equality?

I do not care whether he is for the ERA or against the ERA. That is not the issue. The issue is his attitude toward women in this country. He looks upon them as second-class citizens.

I frankly thought we had passed that point in our history a long time ago. But putting Justice Rehnquist on the Supreme Court as Chief Justice will be a throwback, will be a turning back of the clock to a time when some in this country were more superior than others; when those of certain races were more superior than those of other races; when men were more superior than women. Justice Rehnquist was pretty sure the equal protection clause did not require changes in this traditional role for women and he did not want an equal rights amendment which would change this tradition.

I respect his right to be opposed to the equal rights amendment. Every person has that right. I do not respect his right to think that women are inferior to men and, on that basis, to become the Chief Justice of the Supreme Court of the United States.

Justice Rehnquist wanted to be sure that women kept their place. He did not believe in the equality of women under the Constitution then, and his overwhelming rejection of constitutional equality claims shows he does not believe in it now as a Justice of the Supreme Court.

The fact is, this view is totally reflected in his approach to the Constitution. Women do not get a fair shake under Justice Rehnquist.

Virtually every claim of discrimination is rejected.

Under Justice Rehnquist's view of our Constitution, women are second-class citizens and there is nothing they can do about it.

Then, when you look at Justice Rehnquist's attitude toward individual rights, you arrive at the same conclusion that leads you to say, "Why are we confirming him to become Chief Justice of the United States? Do those who intend to vote for him really understand all the facts? Have they studied the record? Have they studied his positions?"

Let us face it, Mr. President. In 1971, Justice Rehnquist was appointed. Many feared that he would be insensitive and actually hostile to individual rights claims. Those worst fears have been realized. More than insensitive, his record shows a consistent indifference to the rights of the disadvantaged minorities and women. He has just been insensitive to the problems and the cases that have been brought by the disadvantaged, by minorities, by women.

Time and time again, he is on that side and in many instances, he is on that side as the sole dissenter.

Ten years ago, a Harvard professor summed up Justice Rehnquist's individual rights record. He stated that in a case involving a claim by an individual against the Government, Justice Rehnquist almost always sided with the Government.

Is that not odd, when you stop to think about it? Is it not odd that this great conservative would always be for that big government against the individual? But that is his record on the Court.

You have to arrive at the same conclusion that that distinguished Harvard professor arrived at 10 years ago when you look at the record today. The record shows that he gives the Constitution very limited application when it comes to the individual's rights. He gives the individual very little constitutional protection. In Justice Rehnquist's view, the Constitution does not protect the individual from big government.

When you look at his record in race discrimination cases, he rejects almost all claims. I can understand somebody coming down with a conclusion that way maybe 60-40, 55-45, even 70-30. But in Justice Rehnquist's case, any member of the minority in this case who looks at that record and has a case before the Supreme Court has to be very concerned as to whether he or she is going to get equal justice, because in race discrimination cases, Justice Rehnquist rejects almost all claims.

He dissents from major school desegregation decisions. There are few decisions where he finds race discrimination and when he does, it is in cases where the Court is unanimous.

You never find him standing up for the rights of the minority, the rights of the individual, the rights of the disadvantaged in one of his well-known dissents. In the few cases where he is on the side of those against whom there has been racial discrimination, those are cases where the decision has been unanimous.

In sex discrimination cases, you find the same pattern. He rejects almost all constitutional sex discrimination

cases. As a matter of fact, talking about civil rights cases, race discrimination, the NAACP Legal Defense Fund and the American Civil Liberties Union did an analysis of his decisions. When you read that analysis, there is only one conclusion: Justice Rehnquist is not fair. His justice is unbalanced when it comes to sex and racial discrimination cases.

When it comes to sex discrimination cases, the Federation of Women Lawyers and the National Organization for Women detail that record. I believe both of those analyses of the NAACP Legal Defense Fund and the ACLU, as well as the statement of the Federation of Women Lawyers and the National Organization for Women, have already been submitted for the RECORD and I shall not do so at this time.

Justice Rehnquist rejects all constitutional claims of prisoners and parolees. Neither the context nor the claim seems to matter. The prisoner or the parolee is guilty without coming before the Court.

He rejects almost all claims that the Government has violated the separation of church and state provisions of the Constitution. He takes extreme positions, too, on issues of individual rights.

He is the only Justice to say that the Government does not have to be neutral on religious issues. That decision was decided on a 6-3 basis, but he had a separate dissent in which he pointed out his view that the Government does not have to be neutral on religious issues.

□ 1540

Let me read what he said:

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means. . . .

That is the case of *Wallace. Jaffree,* 105 S. Ct. at page 2520, decided rather recently in 1985, with Justice Rehnquist dissenting.

Justice Rehnquist is the only Justice to say that the church can be given governmental power. That had to do with the right of a church to veto the issuance of liquor licenses, the right of a church to veto the issuance of a liquor license, but Justice Rehnquist felt that the church can be given governmental power.

He is the only Justice to say States can deny nonresident indigents medical care, in the case of Maricopa Hospital versus Maricopa County.

He is the only Justice to say that the free exercise clause does not apply to prisoners, in the case of Cruz versus Beto.

He is the only Justice to say that legal aliens can be barred from all civil service positions, in the case of Sugarman versus Dougall.

He is the only Justice to say that legal aliens can be barred from the professional engineering and notary public positions, in the case of Examining Board versus Flores De Otero and Bernal versus Fainter.

He is the only Justice to say that criminal trials can be closed to the public, in the case of Carter versus Kentucky.

He is the only Justice to say that permanent civil service workers may be terminated without notice or a hearing in the case of Cleveland versus Loudermill.

He is the only Justice to say that an ACLU Lawyer could be disciplined for telling a poor person that the ACLU gives free legal services, in the case of In Re Primus.

He is the only Justice to say that the IRS could give tax-exempt status to racially discriminatory private schools, in the case of Bob Jones University versus the United States.

We are talking about the record of a man whom we are asked to confirm as Chief Justice of the United States. It is a record of indifference to important individual rights. It is a record of indifference to the role of courts in the protection of individual rights.

Confirmation power must be used to uphold and strengthen our basic constitutional values. That is our obligation. That is the reason we are given the right to confirm members of the judiciary.

We undermine the importance of the individual and our constitutional system if we now confirm Justice Rehnquist to become Chief Justice of the United States.

We must consider the effect the person who holds this office will have on fundamental values. The selection of a Chief Justice is far too important to permit us to rubberstamp the President's choice. We must make our own judgment.

Justice Rehnquist is simply not the appropriate person to lead the Court. If we care at all about the importance of individual rights in this country, it is our duty, it is our obligation, it is our responsibility to oppose this nomination.

Mr. President: I ask unanimous consent that the following materials be made part of the RECORD:

First. A memorandum from Assistant Attorney General Rehnquist regarding the equal rights amendment.

Second. A letter of September 13, 1986, from the Society of American Law Teachers opposing the nomination of Justice Rehnquist.

Third. An updated list of 165 law professors who have signed a letter dated September 5, 1986, raising concerns about the nomination of Justice Rehnquist.

Fourth. A letter dated September 11, 1963, signed by 63 law professors, raising concerns about the participation of Justice Rehnquist in Laird versus Tatum.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MAY 4, 1970.

MEMORANDUM FOR THE HONORABLE LEONARD GARMENT, SPECIAL CONSULTANT TO THE PRESIDENT

Re: Proposed Equal Rights Amendment to the Constitution: Brief in Opposition

Brad Patterson advises me that you have already reviewed the memorandum for the Citizens Advisory Council on the Status of Women, prepared by Miss Mary Eastwood of my office, dealing with the proposed equal rights amendment.* I consider this memorandum an excellent brief in support of the adoption of the amendment. He suggested that I summarize objections to the adoption of the amendment, in order that both sides might be available to you. This I now do.

Summary

Under existing constitutional restrictions contained in the Fourteenth Amendment, women are presently in a position to successfully challenge any distinction in treatment between themselves and men which has no rational basis. Recent decisions of lower federal courts have included exclusion of women from juries and exclusion of them from public institutions of higher learning as falling within this catgegory. The proposed "equal rights amendment" is intended to virtually abolish all legal distinctions between men and women, leaving intact only laws punishing rape, laws providing maternity benefits, and separate rest rooms in public facilities.

I believe the basic policy objection that may be urged against the amendment is that its designed effect will not be to confer any benefits or privileges upon women, but instead to invalidate existing laws enacted on the theory that in some areas women were entitled to privileged and favorable treatment. It is highly dubious, in my mind, whether a great majority of American women, to say nothing of American men, if they knew that this were the main thrust of the "equal rights amendment", would support it. The consequences of a doctrinaire insistence upon rigid equality between men and women cannot be determined with certainty, but the results appear almost certain to have an adverse effect on the family unit as we have known it.

A second argument which may be urged against the amendment is that its language is so vague as to make it impossible to predict how the courts will apply it. Since its supporters rely for its content not upon the language itself, but upon a Senate report filed at one of the times it earlier passed the

*I have relied on Miss Eastwood's memorandum as a source of decided cases on the subject.

Senate, the question arises as to whether it might not be wiser to employ greater detail in drafting the amendment itself.

Existing state of law

Women received the right to vote on the same terms as men do by virtue of the Nineteenth Amendment to the Constitution. The equal protection clause of the Fourteenth Amendment has also led some courts recently to invalidate, las violative of that provision of the Fourteenth Amendment, laws which either permitted or required women to be treated differently than men. For example, a three-judge federal court in Alabama held that that state's law excluding women for jury service violated the Fourteenth Amendment. *Whits* v. *Crook*, 251 F. Supp. 401 (M.D. Ala. 1966). A similar result, where a state trial court had excluded women jurors from the panel because testimony relating to cancer of male genital organs would be involved, was reached by the Court of Appeals for the Sixth Circuit in *Abbot* v. *Mines*. 411 F. 2d 353. Whereas only ten years ago the Supreme Court declined to hear a case in which a Texas state court had upheld the exclusion of women for Texas A & M, *Allred* v. *Heaton*, 364 U.S. 517 (1960), more recently lower federal courts in Connecticut and Virginia have indicated that female applicants to state institutions of higher learning must be treated on the same basis as male applicants are treated. A like result has been reached by the Supreme Court of Pennsylvania in *Commonwealth* v. *Daniel*, 430 Pennsylvania 642 (643 Atlantic 2d 400 (1968).

On the other hand, recent decisions of the federal courts indicate that *favorable* treatment for women, as opposed to men, in areas such as social security regulations relating to benefits, ineligibility for the draft, and restrictions on the hours of work for women, do not violate any constitutional provision. *Gruenwald* v. *Gardner*, 2d Cir., 591 (1968) (social security benefits); *United States* v. *St. Clair*, S.D. N.Y., 291 F. Supp. (1968) (draft eligibility; *Mengelkoch* v. *Industrial Welfare Commission*, C.D. Calif., 284 F. Supp. 950 (1968) (special restrictions on hours at work).

In other areas where differences of treatment accorded to women than to men are traditional, it seems doubtful whether under existing interpretation of the Constitution that these differences would be invalid. In many states, women may marry without parental consent at an earlier age than men; men may commence working at an earlier age than women without violation of the child labor statute; the parental obligation of support may be cut off with respect to daughters at an earlier age than it is to sons; the maximum age for juvenile court jurisdiction, as opposed to adult court jurisdiction, is frequently higher in the case of girls than of boys. The basis for sustaining such legal differentiation under the equal protection clause, of course, is that there is thought to be a rational basis in each case for treating women or girls differently than men or boys are treated.

The proposed equal rights amendment

The amendment contains the following language:

"Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.",

and would contain further language authorizing Congress and the states to enforce the amendment by appropriate legislation.

Substantive effect of proposed amendment

The intended effect of the amendment, as gleaned from Miss Eastwood's memorandum, would be to prohibit virtually all distinctions between men and women presently embodied in the law. It is undoubtedly intended to have a broader sweep than the provisions of the Nineteenth Amendment and the Fourteenth Amendment as presently interpreted, and is apparently intended to wipe out virtually all distinctions which have previously been thought to accord women a preferred status under the law. The only two distinctions recognized in the Senate report, to which the women's rights advocates turn to explain the meaning of the generalized language of the amendment itself, would be laws which by their terms could only apply to one sex (maternity benefits, prohibition of rape), and regulations based on the right of privacy "in our present culture" (separate rest room facilities in public buildings).

Assuming that the intent of the amendment were clear, and that it accomplished pretty much what the Senate report said it would accomplish, there is in my mind a rather serious policy question as to whether most people, or indeed most women, would desire to have these results accomplished. Do a majority of women wish to be deprived of special protection in hazardous occupations? Do a majority of women wish to see their preferential treatment under the Social Security Act taken away? Do a majority of women wish to be eligible for the military draft? Put in broader terms, do a majority of women really wish to have the only distinction between themselves and men be the preservation of separate rest rooms in public buildings?

Undoubtedly many of the supporters of the equal rights for women amendment have rationally and carefully considered these questions, and have answered them in the affirmative. But I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional differences between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different role in this regard.

One practical effect of the amendment deserves attention, as an example of the sort of unsettling effect that the rigid doctrine of equality might have in many fields. [Traditionally, the domicile of a married woman has been that of her husband, and if the husband decides to move from Boston to Chicago in order to take a different job, the wife is legally obligated to accompany him (as well as being obligated by virtue of traditionaly marriage vows and most religious teaching).] The law makes an exception in the case where at the time the husband moves, the wife has grounds for separation or divorce. [The reason for the rule which the courts have traditionally given is that someone in the family must be vested with the power of decision as to where the family will locate, and that by custom and tradition the husband is invested with this authority.] While it is quite true that any family reduced to putting things in terms of the legal rights of its members may be in bad shape, a change in the law will undoubtedly have an effect on custom and practice. If there is to be change, a rule which would at least be workable would be one which placed the power of decision in the wife, rather than the husband. [But the equal rights amendment apparently would leave both parties with the power to decide this question—with a result which could indeed, to paraphrase a famous English author, turn "holy wedlock" into "holy deadlock".]

While each individual is (or she) certainly free to choose whichever view of this subject he prefers, there is to me a rather serious question as to whether the administration ought to support a constitutional change which appears to be aimed primarily not at granting to women any tangible improvement in their situation—indeed, its result might be quite the opposite—but instead to the granting to women of a rigid, doctrinaire equality in all respects with men.

Legal effect of proposed amendment

Just what the amendment would accomplish is not at all clear. This is not necessarily a criticism of it, for the Constitution has previously been amended in language of broad generality, the precise meaning of which was probably known to few of those who drafted it or concurred in its adoption. Obvious examples are the various general clauses of the Fourteenth Amendment. However, conceding that a certain amount of vagueness may be required in enunciating broad constitutional principles, the language of the equal rights amendment, taken in the context in which it is presented, is cause for concern.

The language itself admits of any number of interpretations. A court would not be irrational, taking only the operative language, in saying that it was intended to do no more than restate the requirement of the equal protection clause of the Fourteenth Amendment in the special context of women's rights. This construction would mean that no distinction between men and women is lawful unless it has a rational basis in fact. While such language would result in invalidating some existing legal distinctions between men and women (primarily those referred to in the earlier part of this memorandum) as having already been struck down by lower federal courts, such a constuction would have the serious drawback of accomplishing nothing that the existing Fourteenth Amendment did not already accomplish. In addition, the Senate report suggests that a much broader sweep is intended. These two arguments make it reasonably certain that the courts would reject such a construction as being too narrow.

At the other extreme, it is possible that a court could conclude as a result of the enactment of this amendment that no legal distinction between men and women was permissible, regardless of circumstances. Such a construction would, of course, run squarely into the rather obvious fact that women *are* physically different from men; that women bear children, and men do not; and also into the language of the proposed Senate report which itself concedes that at least separate rest rooms would remain constitutionally valid. For these reasons, I think the courts would reject so sweeping a construction of the proposed amendment as this.

The virtue of both of the foregoing constructions of the amendment—the one narrow, requiring only a rational basis in fact to sustain a classification, and the other broad, permitting no classification whatsoever, is that either of them would be relatively easy to apply. Rejection of both of them for the reasons above stated leaves

one in a kind of murky middle ground, perhaps more sensible in many respects but nonetheless bringing with it great difficulties in knowing with any certainty what the amendment means.

One possible guide through the murk is the Senate report, containing the interpretation apparently desired by the proponents of the amendment. Summarizing the Senate report, difference in treatment between men's and women's property rights (dower, separate property in community property states, and the like), non-mandatory jury service, military service for women distinctions between the sexes as to domicile, alimony, child custody, and laws limiting employment of women in unusually strenuous or extra hazardous occupations would be unconstitutional. Absolute equality of access to educational facilities—presumably including West Point and Annapolis—would be required. Statutes punishing rape and prostitution would remain valid, and separate rest rooms in public facilities of course would be constitutionally permissible.

While it is not unusual to resort to legislative history in interpreting ambiguities of meaning in a statute, such resort is far less common in the case of constitutional amendments. The question that first arises is whether or not the courts would in fact do as the proponents seem to intend—treat the Senate report as a catalog of the changes which the amendment was designed to produce. The second question which arises is why, if this is the case, should not the amendment be revised to be made a good deal more specific, along the lines of the Senate report, in order to say that its supporters stated it is intended to say.

Federalism

Since the proposal is a constitutional amendment, there is no doubt that it may, consistent with the Constitution, accomplish the purpose for which it is designed, assuming that such purpose is clear from the language chosen. But I think that considerations of federalism to which the President and the Republican Party have been traditionally devoted may call for a somewhat less superficial inquiry than that. Since the states would play a part in the adoption of the proposed amendment, it would not be a case of the national government imposing its will on the state government. But the adoption of the amendment would nonetheless sharply restrict the power of the states, as well as of the national government, to engage in legislative adjustment and accommodation in what must surely be described as an area which does not lend itself to doctrinaire prescription. I believe one could feel that changes are desirable in the legal relationships between men and women and nonetheless feel that a rigid constitutional amendment such as this is not the way to seek those changes. If one were to feel that way, he would obviously also feel that the administration should not propose the amendment.

Conclusion

Justice Holmes once made the comment that it would take more than the Nineteenth Amendment to convince him that there was no difference between men and women. [I have the impression that a large number of the country's women, as well as almost all of the country's men, would like to see some of the laws based on physical differences constitutionally permissible, even though they share the desire of many women to do away with laws which irrationally differentiate in their treatment of men and women.] All of this can be accomplished under the existing language of the Fourteenth Amendment. The effort to go further and strike down all legal differentiation, rational or irrational, as a matter of constitutional law is one which should give serious pause. [The overall implication of the equal rights amendment is nothing less than the sharp reduction in importance of the family unit, which the eventual elimination of that unit by no means improbable.] It may be that the country is heading in this direction anyway, and that there is very little that the administration can do to stop it. But this surely does not mean that the administration ought to support a change which will in fact hasten the dissolution of the family.

WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel.

SOCIETY OF AMERICAN LAW TEACHERS, UNIVERSITY OF CALIFORNIA SCHOOL OF LAW,
Davis, CA, September 13, 1986.

MEMBERS OF THE U.S. SENATE,
Washington, DC.

I write on behalf of the Society of American Law Teachers (SALT) to oppose the nomination of William H. Rehnquist to become Chief Justice of the United States. The Society of American Law Teachers is a membership organization of individual law professors. We are unique among organizations in legal education because we represent the views of individual teachers, rather than those of our affiliated institutions. Our opposition reflects the unanimous opinion of the members of the Board of Governors at the end of an extensive internal debate.

We fully recognize the President's power to select a Chief Justice who shares his own political views. Our objection to this nomination does not stem from political opposition. Our views rest instead on two grounds. First, we have concluded that the serious questions of ethical impropriety arising from Justice Rehnquist's participation in *Laird* v. *Tatum* simply cannot be resolved in his favor. Secondly, we have grave reservations about his record of demonstrated hostility to the constitutional ideals of equality and individual rights.

We turn first to the question of integrity and ethics. We have found it difficult, to overlook the serious questions of credibility arising from the nominee's disturbing memory lapses concerning controverted matters of the gravest national importance. Our concern here rests not on a single occurrence, but rather on a cumulation. We find it difficult to avoid the conclusion that Justice Rehnquist has failed to meet the test of Canon 2 of the Code of Judicial Conduct which requires that he conduct "himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." We have read the opinion letter of September 8, 1986 from Professor Geoffrey Hazard to Senator Charles Mathias, and the comprehensive analysis of Professor Floyd Feeney and Mr. Barry Mahoney. Professor Hazard notes that Justice Rehnquist "had a duty of order to the Senate in answering questions concerning *Laird* v. *Tatum* . . . (he) complied with (that) duty only if his statement is accepted that he had 'no recollection of any participation in the formulation of policy on the use of military to conduct surveillance.'" Professor Hazard observed that "whether that statement should be accepted is a matter of judgment." It is the judgment of the Society of American Law Teachers that this lapse cannot be accepted.

We are guided by our roles as teachers of the future lawyers who will serve the citizens of this country. We are concerned that the message we will send to the next generation of lawyers is one of cynicism for law. Our concern in this regard extends as well to members of the general public. Today the honesty and integrity of every lawyer is subject to doubt in the minds of many members of the public. We fear irreversible damage to public confidence in the integrity of the judicial branch if Justice Rehnquist is confirmed. The office of Chief Justice is unique in our constitutional government. Only 15 citizens have served this country in that capacity. The Chief Justice must embody the spirit of our highest aspirations for honest, impartial judicial conduct. Both our students and the general public will find much to confirm the cynicism about which we are concerned. We have come slowly, and painfully to the conclusion that the honesty and integrity of this high office will be seriously degraded if this nominee, is confirmed.

A second, and equally critical factor in our decision to recommend that you withhold your consent from this nomination, is our concern that the candidate has a consistent, demonstrated hostility to the constitutional values of equality. We base our view in this regard upon our assessment of his non-judicial conduct. The confirmation hearings revealed many things about the Justice's conduct before he joined the Court. We are disturbed by the contradictions of eyewitnesses concerning Justice Rehnquist's involvement in partisan challenges to minority voters. We are disturbed by the reports of memoranda prepared by the Justice while he was a law clerk and in a second instance, while he was an Assistant Attorney General in the Justice Department. In the first instance, he is reported to have stated the view that *Brown* v. *Board of Education* was wrongly decided. In the second instance, he is reported to have expressed views concerning the role of women in the family that are so extreme as to under cut our confidence in his fidelity to the constitutional ideal of equality.

For all of the reasons stated above, we urge you to withhold your consent, or in the alternative to return this nomination to the Judiciary Committee.

Sincerely,

ERMA COLEMAN JORDAN,
President.

TO THE SENATE OF THE UNITED STATES,
SEPTEMBER 5, 1986

We the undersigned members of the law teaching profession ask that the Senate of the United States weigh with especially solemn deliberation the nomination of Justice William Rehnquist as Chief Justice. We ask this for two reasons.

First, it will take a conscious effort to resist the tendency to accept as determinative the 13-5 vote of the Judiciary Committee. The unanimous vote of the same Committee in favor of Judge Scalia proves that the opposition to Justice Rehnquist was not, as has been asserted, based solely on politically or ideologically motivated grounds. Five votes against a sitting Justice is really reason for pause. The conscience-searching questions that Senator Leahy wrestled with are matters that every Senator must, in fidelity, decide upon alone in a quiet place

and time, away from the political arena. We ask therefore that each of you resist the political push and decide this most important appointment of all as a matter of individual conscience.

The second reason that we ask for this extraordinary personal effort from every single Senator, even those who voted favorably in Committee, is related to the first. As teachers we are troubled by a growing cynicism among our students, particularly with respect to ethics in government. Paradoxically, in the post-Watergate period, proof of statutory crime is becoming the standard by which we measure the highest officials of the land. This perception must be changed. If history and tradition are guides, the Senate and the Judiciary are the institutions that can best signal that change. In many respects then this very significant confirmation hearing has become a testing ground for the ethical standards of this nation.

The questions that have been raised about Chief Justice designate William Rehnquist are varied. Nevertheless there is a common and disturbing thread that runs through all of the matters that have been raised at the hearings. That common thread pertains to the integrity and ethical standards of the nominee. And taking the character measure of judicial candidates is the primary duty of the Senate under the Advice and Consent clause.

The doubts that have been expressed about Justice Rehnquist's fitness arise not only from the particular charges of improper behavior but also from the responses in each instance the nominee has made to the charges. These charges and the responses are summarized below.

(1) First there is the response to the charges of voter harassment in the Arizona elections. In his testimony at the recent hearings and after the first confirmation hearing Mr. Rehnquist claimed that he had not personally challenged a voter on literacy grounds and that in any event literacy challenges were then legal under Arizona law. But the testimony against him and his own admissions establish that he at least knew what was going on and participated in some manner in the strategy of challenging voters at the polling places. Such strategy was bound to and indeed did involve intimidation and delay, as witnesses testified. Nevertheless, to this day Justice Rehnquist sees little wrong with what took place there because no technical violation of the law had been proven. There is a question of moral obtuseness in this response that we ask our Senators to reflect upon as they consider the other charges that have been raised.

(2) With respect to the restrictive convenants it is not a matter of what he did or failed to do, but likewise a question of his response to the existence of such obnoxious clauses. One response he made was that the clauses were unenforcible, again revealing a lack of appreciation for the ethical and symbolic dimensions of law. But he also said that he did not know of the existence of these clauses, an explanation that was only plausible if he had left the reading of his deeds to his lawyers. After the hearings however, he turned over a letter from one of his lawyers in which the restrictive covenant language was explicitly drawn to Justice Rehnquist's attention. This seemed to refute the Justice's testimony that he had no prior knowledge of the offensive language, or worse, it suggested that he felt compelled to correct his testimony because one of his lawyers was unwilling to accept the implied blame for failing to address the question of the restrictive convenants. We ask our Senators to consider what this initial willingness to implicitly shift blame to his lawyers for failing to do anything about such covenants in the deeds says about the integrity of the nominee.

(3) This same willingness to shift blame for an embarassment or a misdeed is also possibly revealed in the manner in which Justice Rehnquist responded to the questions about the memorandum opinion he drafted while clerking for Justice Robert Jackson. Notwithstanding the fact that there is no historic evidence that Justice Jackson ever supported the separate but equal doctrine, Mr. Rehnquist intimated that Jackson was considering a dissent in the *Brown* case. Holding the views expressed in that memorandum opinion in the fifties is not nearly as bad as disowning them and implied assigning them to someone of whose reputation the nominee, as a former clerk, should be solicitous. We ask once more that our Senators consult their collective experience about human behavior and apply this to the pattern of responses the candidate has made to the various charges brought against him.

(4) There have been charges by Justice Rehnquist's brother-in-law of a breach of ethics in connection with a trust fund. Such charges would be the basis of a bar committee investigation if lodged against an ordinary attorney. So far there has been no response from Justice Rehnquist and to the best of our knowledge no investigation by an official body.

(5) Lastly, in the light of the foregoing, we ask our Senators to review in close detail the explicit charge of the failure of judicial ethics arising from the refusal of Justice Rehnquist to disqualify himself in the case of *Laird* v. *Tatum*. Perhaps this is the most significant matter because in this instance the response to an ethical demand is largely set forth in the words of Justice Rehnquist for all to read and fairly judge.

In a memorandum submitted to the Judiciary Committee Professor Askin of Rutgers Law School has emphasized one basis for questioning the judicial ethics of the nominee. That basis was that testimony before the Ervin Committee by then Assistant Attorney General Rehnquist revealed that he had knowledge of *or had formed an opinion about facts* that were in dispute in *Laird v. Tatum* and were depositive of one of the questions before the Court. This point is clearly made by Professor Askin and we simply ask every Senator to study Professor Askin's submission with care. But there are two other points that require less careful study and these points raise serious questions of intellectual honesty.

When the subject of the Army surveillance of civilians came up at Mr. Rehnquist's first confirmation hearings he said that it would be improper for him to comment on issues involving the surveillance investigation because of his "lawyer-client relationship" with the President and Attorney General. *Laird v. Tatum* dealt specifically with the subject of the Army surveillance of civilians yet Justice Rehnquist stated his relationship to the subject under review very differently in his recusal opinion. There he said "that my total lack of connection with . . . the case of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department." Although Mr. Rehnquist declined to testify before the Senate Committee, once on the Court he had no difficulty deciding a case that dealt with the very subject for which he had claimed an attorney-client privilege.

The same issue of intellectual honesty appeared even more plainly perhaps in another portion of his recusal opinion. Justice Rehnquist dismissed the applicablity of the Canons for "Standards of Judicial Conduct" by describing them as "not materially different from the standards enunciated in the [federal disqualification] statute." The statute, in pertinent part, required disqualification in any case where a justice "has a substantial interest, [or] has been of counsel or has been a material witness." The Canons, which were not set forth in the opinion, in pertinent part state:" A judge should disqualify himself in a proceeding in which *his impartiality might reasonably be questioned* including but not limited to instances where: (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as a lawyer in the matter in controversy . . . ." We ask the Senators whether under any interpretation of language these two standards honestly can be described as "not materially different."

The matters that appear on the face of the *Laird v. Tatum* disqualification case as well as the responses to all the other matters previously summarized are not political attacks nor are they trivial. Each of them relate directly to the central issues of integrity, honesty and character. Whatever the outcome of the confirmation vote, Mr. Justice Rehnquist will sit on the Supreme Court. The ultimate question that each Senator must answer is whether Justice William Rehnquist, in the words of Canon 2 of the Code of Judicial Conduct of the American Bar Association, has conducted *"himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."* If a Senator entertains the slightest doubt on that question with respect to the nominee for the highest judicial post in the land we humbly ask that consent be withheld and the President be advised to submit the name of a candidate who unequivocally meets the demanding standards the people have the right to expect.

Arthur Berney, Boston College.

David Chambers, University of Michigan.

David Cobin, Marie Falinger, Howard Vogel, Mary Jane Morrison, Hamline University.

Michael Kindred, Ohio State University.

Grayford B. Gray, University of Tennessee.

Patrick Charles McGinley, West Virginia University.

William L. Andreen, Timothy Hoff, Jerome Hoffman, Wythe Holt, Gene Marsh, Norman Stein, Manning Warren, University of Alabama.

Mark Brodin, Kenneth Ernstoff, Zygmund Plater, Alexis Anderson, Paul Tremblay, Peter Donovan Mark Spiegel, Robert Cottrol, Robert Berry, Ruth Arlene Howe, Robert Smith, Boston College.

Rhonda Rivera, Ohio State University.

Mark Tushnet, Georgetown University.

Kurt Strasser, University of Connecticut.

Otis Cochran, University of Tennessee.

Peter Shane, University of Iowa.

Jerry Phillips, University of Tennessee.

Carrie Menkel-Meadow, Leon Letwin, University of California at Los Angeles.

Robert Steinfeld, Isabel Marcus, Errol Meidinger, State University of New York at Buffalo.

Debra Evenson, DePaul University.

Paul Chevigny, Chester L. Mirsky, Stephen Gillers, Sylvia Law, Peggy Davis, New York University.
Peter Bayer, University of Baltimore.
Elizabeth M. Schneider, Brooklyn Law School.
Paul Brietzke, Valparaiso University.
Charles E. Wilson, Ohio State University.
Richard Ottinger, Pace University.
Arthur Pinto, Mary Jo Exster, Neil Cohen, Brooklyn Law School.
Herman Schwartz, American University.
Peter Aron, George Washington University.
Alan Freeman, State University of New York at Buffalo.
Burt Wechsler, American University.
Nadine Taub, Barbara Stark, Robert Westreich, Edward Lloyd, Carlos Garcia, Jack Feinstein, Rutgers University.
William J. Quirk, University of South Carolina.
Stephen Dycus, Vermont Law School.
Bernadette Hartfield, Paul Milch, Nicholas Richter, Jodi English, Norman Townsend, Charles Marvin, Roy Sobelson, Kathryn Urbonya, Georgia State University.
Laura Macklin, Georgetown Law School.
Egon Guttman, American University.
Bailey Kuklin, Brooklyn Law School.
Ndiva Kofele-Kale, Tennessee.
Neil Gotanda, Western State University.
Liz Ryan Cole, Pamela Ryan, Ben Aliza, Vermont Law School.
David Hill, University of Chicago.
Harvey M. Johnson, Prakash Sinha, James J. Fishman, Gayle Westerman, Ralph Stein, Frank Bress, Stuart Madden, Merrill Sobie, Donald Dorenberg, Norman B. Lichtenstein, Pace Law School.
Susan Kovac, University of Tennessee.
Richard L. Abel, University of California at Los Angeles.
Phoebe Haddon, Temple Law School.
Vivian Wilson, Hastings Law School.
Stuart Filler, Bridgeport Law School.
Michael B. Mushlin, Seymour A. Casper, Pace Law School.
Erwin Chemerinsky, University of Southern California.
Dennis Lynch, Terrence J. Anderson, Kenneth M. Casebeer, Jeremy R. Paul, Joel Rogers, Irwin P. Stotzky, Mary I. Coombs, Richard Hyland, Richard M. Fischl, Robert E. Rosen, University of Miami.
Mark Lowenstein, University of Colorado.
Judith Kasper, Vermont Law School.
Eric Blumenson, Suffolk University.
Eva Nilsen, Boston University.
Arpiar G. Saunders, Jr., Franklin-Pierce Law Center.
Marc D. Greenbaum, Judith Keys, Gerard J. Clark, Robert P. Wasson, Jr., Stephen C. Hicks, Suffolk Law School.
Lawrence Schlam, Joel H. Swift, Northern Illinois University.
Jules Lobel, University of Pittsburgh.
Stefan Krieger, University of Chicago.
Nancy Rogan, Vermont Law School.
Barlow Burke, Edwin Hazen, Elliott Milstein, Ann Shattuck, American University.
Naira Soifer, University of Maine.
Ronald Collins, University of Puget Sound, in Tacoma, WA.
John Strait, University of Puget Sound.
Barbara Salken, Barbara Atwell, Carol Olson, Pace Law School.
Charles Carr, University of Buffalo.
Irene Scharf, Pierre Schlag, University of Puget Sound.
Ken Kreiling, Vermont Law School.
Leonard Sharon, University of Maine.
Jennifer Schramm, University of Puget Sound.
Charles Shaffer, Eric Schneider, University of Baltimore.
Alan Zarky, University of Puget Sound.
Judith Resnik, University of Southern California.
Bernard V. Keenan, Victoria J. Dodd, Dwight Golann, Nancy E. Dowd, Joseph W. Glannon, Bernard Ortwein, Suffolk Law School.
Elizabeth Mensch, New York University at Buffalo.
John Brittain, University of Connecticut.
Roy Mersky, New York University.
Gary Palm, Dean, Chicago Law School.
Jonathan Case, Dean, Vermont Law School.
Robert Cole, University of California, Berkeley.
Michael Altman, Arizona State University.
Linda Lacecy, Taunya Banks, University of Tulsa.
Susan N. Herman, Marsha Garrison, Brooklyn Law School.
Andrew Silverman, University of Arizona.
John P. Morris, David Kader, Jane Aken, Arizona State University.

SEPTEMBER 11, 1986.

Hon. STROM THURMOND,
Chairman, Judiciary Committee, U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: This letter concerns the memorandum entitled "An Analysis of the Public Records Concerning Justice Rehnquist's participation in *Laird v. Tatum,*" which was submitted to the Senate Judiciary Committee on September 5, 1986.

The memorandum is now being circulated among law teachers. The professors whose names appear on the attached sheets have indicated their belief that the issues raised by Justice Rehnquist's participation in *Laird v. Tatum* are of serious concern and should be investigated further by the Senate.

Yours respectfully,

FLOYD FEENEY,
Professor of Law, University of California, Davis.

BARRY MAHONEY,
Attorney, Denver, CO.

SEPTEMBER 11, 1986.

[List of law professors who have read the memorandum entitled "an analysis of the public records concerning Justice Rehnquist's participation in *Laird v. Tatum,*" and who believe it raises issues of very serious concern which should be fully investigated by the Senate.]

Edward J. Barrett, Jr., Florian Bartosic, University of California, Davis.
John Batt, University of Kentucky.
William C. Beaney, University of Denver.
Antonia Bernhard, University of California, Davis.
Donald Brodie, University of Oregon.
Carol Bruch, University of California, Davis.
Claudia Burton, Willamette Law School.
John Burkoff, University of Pittsburgh.
Joel Dobris, Harrison Dunning, Daniel Dykstra, University of California, Davis.
Howard Erlanger, University of Wisconsin.
Mary Louise Fellows, University of Iowa.
Ted Finman, University of Wisconsin.
John J. Flynn, Jefferson Fordham, University of Utah.
Daniel J. Freed, Yale Law School.
Marc Galanter, University of Wisconsin.
Alvin Goldman, University of Kentucky.
Joseph Goldstein, Yale University.
Gary Goodpaster, University of Wisconsin.
Kathy Graham, Willamette Law School.
Jack Greenberg, Columbia University.
Mary Jane Hamilton, University of California, Davis.
Frederick Hart, University of New Mexico.
Hendrik Hartog, University of Wisconsin.
William Hellerstein, Brooklyn Law School.
Stephen Herzberg, University of Wisconsin.
James Hogan, University of California, Davis.
James E. Jones, University of Wisconsin.
Emma Jordan, Friedrich Junger, University of California, Davis.
Leonard Kaplan, Peter Karten, University of Wisconsin.
Lewis Katz, Case-Western Reserve Law School.
Neil Komesar, University of Wisconsin.
Pierre Loiseaux, University of California, Davis.
Tracey MaClin, University of Kentucky.
Scott Matheson, Jr., University of Utah.
Robert B. McKay, New York University.
Marygold Melli, University of Wisconsin.
Howard Messing, Nova Law School.
John Morris, University of Utah.
Ray Mirsky, University of Texas.
Rex Perschbacher, University of California, Davis.
Jane M. Picker, Cleveland State University.
John Poulos, University of California, Davis.
Walter Raushenbush, University of Wisconsin.
Frank Remington, University of Wisconsin.
Pamela Samuelson, University of Pittsburgh.
Harry I. Subin, New York University.
Jeffrey Stempel, Brooklyn Law School.
Lee Teitelbaum, University of Utah.
Joan Vogel, Rhonda Wasserman, University of Pittsburgh.
Joseph Thome, June Weiseberger, University of Wisconsin.
Martha West, University of California, Davis.
Alan F. Westin, Columbia University-Political Science.
William Whitford, University of Wisconsin.
Donald Winslow, University of Kentucky.
Richard Wydick, University of California, Davis.

□ 1540

Mr. MITCHELL. Mr. President, today we debate, tomorrow we vote on a nominee to the position of Chief Justice of the United States. The words in the title fairly describe the position: Chief Justice of the United States.

With the single exception of the Presidency, no public office in our Nation possesses greater honor and responsibility.

The Chief Justice of the United States is the symbol of the central fact of our system of government: That every American is bound by the rule of law, that every American should stand equal before the law.

That is an ideal frequently expressed but rarely attained in the history of human societies.

It is a measure of the boundless confidence and optimism of Americans that we have set for ourselves so high

a standard and that we struggle so resolutely to attain it, rising from each failure to an even greater effort.

In that effort our Supreme Court is central. Again and again in our history, the Court has reaffirmed and preserved the rule of law. In 1974, within the memory of every sitting Senator, the Court compelled the most powerful person on Earth, the President of the United States, to act against his will and against his interest. To the amazement of the world and the delight of Americans, we were again reassured that it is not empty rhetoric to say that, in America, everyone, even the President, must obey the law.

The immense power of American courts is not based upon force. Our courts have no independent means of enforcing their judgments. Their power rests ultimately upon public respect for their rulings.

Nowhere is that moral authority greater or more important than in the Supreme Court of the United States.

The Supreme Court is the final arbiter because it is the final forum.

It is also the forum to which the lower courts, the State courts and our citizens look for the judgments that inform and define our society.

When the Court construes the law, it not only chooses among competing rights and values. It helps shape those rights and the society which lives by those values.

On average, 4,000 cases are appealed to the Supreme Court each year. Of those 4,000 cases, the Court will hear and issue written decisions in roughly 150. The decisions it chooses not to make are often as significant as those it makes.

The choice of the Chief Justice is, therefore, a decision of immense significance.

The President has chosen to nominate Associate Justice William Rehnquist to this position.

Justice Rehnquist has served on the Supreme Court for 15 years. His opinions have been praised by some and criticized by others. His fluency has served to clarify some issues and it has served to obfuscate others, as fluency can do.

It is primarily on the basis of those opinions that the Senate should consider his elevation to Chief Justice of the United States.

Unfortunately, because of controversies involving the nominee's personal behavior, the hearings before the Judiciary Committee did not adequately focus on the most important part of his record.

Some of the controversies aired at the hearings are troubling.

But how many of us who have been long active in government could stand to have our every activity investigated, researched, and picked over, in some instances decades after the fact?

I doubt that a hearing process designed to elicit perfection can ever do more than demonstrate what all of us already know: Perfection does not exist in the human condition.

Therefore, while I am concerned about, ever troubled by some aspects of Justice Rehnquist's personal behavior, I do not find them individually, or in the aggregate, a sufficient basis to vote against him.

I refer specifically to the questions raised about Justice Rehnquist's candor, or lack of it, at the hearings on his original appointment to the Court and on his recent nomination to be Chief Justice; his purchase of homes through deeds which contained restrictive convenants; his refusal to withdraw from deciding a case in which he had previously been involved; and his participation in a voter challenge program in Phoenix in the early 1960's.

I will comment briefly on each of these aspects of his record.

It is clear from the record of both hearings that Justice Rehnquist was often vague and nonresponsive in his answers to questions. He also revealed a disturbing pattern of an occasionally clear ability to remember some events alongside a frequent inability to recall others. But there is no substantial evidence of false testimony.

That may be a sadly low standard, but the modern hearing process on Presidential nominations virtually invites such a course of action by witnesses. When a single contradiction or conflict in testimony may be pounced upon as evidence of disqualification, nominees are understandably reluctant to test their memories.

They do and will increasingly seek refuge in the safety of "I don't recall." That neither confirms nor denies the fact in question, leaving the witness flexibility if later evidence is convincing one way or the other.

Given the open hostility of some of his questioners and their previously stated determination to prevent his confirmation, it is not surprising that Justice Rehnquist was as wary and noncommittal as he could be.

I regret that. But it is a fact. Each of us must therefore decide whether his answers to questions were false, or otherwise of a nature to disqualify him from serving as Chief Justice. I conclude they were not.

The second aspect of Justice Rehnquist's behavior to be questioned was his purchase of two homes through deeds with racially restrictive covenants. Such covenants are unfortunately an all-to-common relic of past racism in our society. Justice Rehnquist first said he was unaware of the covenants, then said he did know of one of them when it was disclosed that his attorney had written him a letter calling the covenant too his attention. In any event, the circumstances are too common and the matter to insubstantial to disqualify Justice Rehnquist from serving as Chief Justice.

The refusal of Justice Rehnquist to recuse himself in the case of Laird versus Tatum, by contrast, seems to me to carry with it an implication of insensitivity to what is an important concern for a judge—the appearance of prejudgment, bias or unfairness.

In Laird versus Tatum, Justice Rehnquist in 1972 made the decision that, despite his earlier advocacy of the Nixon administration's position, which the plaintiffs in the case challenged, he was not precluded from sitting in judgment on the outcome of the case.

His response to a request for his abstention took the form of a memorandum in which he set forth his view of the law, and the duty he said it imposed on him to participate in deciding the case.

That memorandum attempted to draw parallels between the case at hand and the experience of other Justices who had been involved in legislative work upon whose constitutionality they later ruled. But it markedly did not contrast the distinction between generalized advocacy of a policy position and his substantial role in the military surveillance issue, where he had actively participated in developing the policy and had previously testified before Senator Ervin's Subcommittee on Constitutional Rights that the judgment in Laird versus Tatum should lie against the plaintiffs.

The law at the time required recusal in conflicts of interest or instances where a judge had been "of counsel" or so closely connected to a party in the proceedings that his participation in the decision might be affected.

Laird versus Tatum raises the question of when a judge should recuse himself in the absence of a personal financial interest but where there is a personal belief so strongly held that it may tend to override the constraints of the law.

Our laws are written and intended to safeguard against "well meaning men of zeal" as well as against potential tyrants. They are intended to withstand passions, and to hold fast to certain central values against the tides of political, ideological, and circumstantial demand.

When a judge is particularly enamored of his point of view and persuaded that it must prevail, self-restraint is particularly important. When a man's career has involved the spirited defense of a policy, as in this case, it is particularly important that the risk of prejudgment be weighed and the appearance of bias fully evaluated.

Justice Rehnquist clearly gave considerable thought to the case, as his lengthy memorandum of explanation demonstrates. I am not persuaded,

however, that he gave as much thought to the risk of bias as to the justification of his decision.

The law at the time left the determination to a justice's own opinion of his rightness to sit, although the American Bar Association's Code of Judicial Ethics also indicated that even an appearance of bias ought to argue for recusal. The ABA Code was virtually enacted as statutory law in 1973, in part because of Justice Rehnquist's refusal to abstain in Laird versus Tatum, and in the hearings, he indicated that if the same situation were covered by the current language of the law, he might not reach the same conclusion.

I find this episode troubling, because a judge, above others, ought to be impressed with the importance of abiding by the spirit as well as the literal letter of the law.

I conclude that Justice Rehnquist made a mistake, a serious error in judgment, and that he would act differently if he had to do it over again. But I do not believe that this one mistake is sufficient in itself, nor does it fit into a pattern of such errors, to disqualify him from serving as Chief Justice.

□ 1600

(Mr. STAFFORD assumed the chair.)

Mr. MITCHELL. Mr. President, the fourth and final area of alleged questionable behavior is Justice Rehnquist's participation in a voter challenge program in Phoenix in the 1960's. Phoenix at the time was a racially divided and politically conscious city in which both parties competed zealously.

The voter challenge project was clearly an effort by Republicans to reduce voting by blacks and Hispanics because of their presumed inclination to vote Democratic. It rested upon intimidation and represented a conscious effort to deny some citizens the right to vote.

Although not illegal at the time, it was deplorable. But there were parallel activities by Democrats in the city, whose busing of black and Hispanic voters to the polls late on election day was intended to keep the polls open, probably encouraged some illegal voting, and no doubt fed the fears of Republicans about illegal voting.

Much testimony was presented on the question of whether or not Mr. Rehnquist actually challenged voters. Even assuming he did, I would not find this a sufficient basis to disqualify him from serving as Chief Justice, if it were an isolated instance, or even one of a few instances, of hostility toward minorities and their rights, or if there were any evidence that his views on this issue had moderated over time.

But this was not an isolated instance. And there is no evidence that Justice Rehnquist's views have moderated at all.

Indeed, his participation in the voter challenge program, while not sufficient by itself to deny him confirmation, is one link in an unbroken chain of deeds and words demonstrating insensitively, even hostility, to the rights of women and minorities, especially black Americans.

Race has been the most deeply divisive issue in American history. For nearly the first century of our national existence, slavery and questions over its extension into an expanding America divided our people and wracked our society with violence. The Supreme Court's decision in the Dred Scott case was one of the most significant in our history. It led directly to the supreme American tragedy of the Civil War.

The result of that war and the passage in its aftermath of the 13th, 14th, and 15th amendments did not, as most Americans hoped and believed, resolve the race issue. Not until 1965, 100 years later, did Congress finally secure the right of black Americans to exercise the most fundamental right in a free society—the right to vote. To this very day, over a century later, race remains a thorn deep in the American side.

But whatever else the American people believe, it is clear that the overwhelming majority of them are convinced that ours should never again be a segregated society. There can be no turning back.

If nothing else, the welling up of emotion in this country against the continuance of apartheid in South Africa is a measure of that attitude.

Unfortunately, tragically, on that most fundamental question, it is clear that Justice Rehnquist does not share the sentiments of most of his fellow citizens.

From 1952 to 1986, by his words and his deeds, Justice Rehnquist has displayed total and unremitting hostility toward the rights of women and minorities, especially black Americans, and a deeply troubling willingness to condone, if not support, a segregated society.

Let me touch on some of the facts which have led me to this sad conclusion.

In 1896, in the case of Plessy versus Ferguson, the Supreme Court upheld racial segregation in public services—in this instance, railroad carriages—by establishing the principle of "separate but equal."

That principle prevailed until 1954 when, in its historic decision in Brown versus Board of Education, the Court reversed Plessy and prohibited segregation in the public schools. Other than the Civil War itself, the Brown decision is perhaps the most significant event in America's long and painful march toward social justice.

Robert Jackson was an Associate Justice of the Supreme Court at the time and William Rehnquist was his law clerk. During the Court's consideration of the Brown case, Rehnquist wrote a memorandum urging Justice Jackson to reaffirm Plessy and sustain the principle of segregated schools.

Rehnquist's later explanation, made after Jackson's death, that he was reflecting Justice Jackson's views, not his own, is wholly unconvincing. For one thing, Jackson voted to reverse Plessy. For another, there is nothing in Jackson's record to suggest that he supported segregated schools, while there is a great deal in Rehnquist's record to suggest that he did. And finally, others with intimate knowledge of Jackson have sharply disputed Rehnquist's explanation.

In a 1976 book entitled "Simple Justice," the author, Richard Kluger, makes it clear that Mr. Rehnquist's explanation is highly improbable. And Justice Jackson's long-time secretary said that Mr. Rehnquist's explanation was "incredible on its face" and "smeared the reputation of a great Justice."

The weight of evidence strongly supports the conclusion that in 1952, William Rehnquist believed in segregation in American public schools. His later actions confirm that conclusion.

In 1954, after the second Brown decision, Mr. Rehnquist wrote another memorandum urging that Justice Jackson upheld a Texas law which permitted only whites to vote in primary elections. He wrote:

> It is about time the Court faced the fact that white people in the south don't like the colored people; the constitution did not appoint the Court as a social watchdog to rear up every time private discrimination raises its admittedly ugly head.

In 1957, the citizens of Phoenix debated a plan to end racial segregation in their public schools. Mr. Rehnquist publicly opposed the plan.

In 1964, the Phoenix City Council adopted an ordinance prohibiting segregation in public accommodations. Mr. Rehnquist testified against the ordinance before its adoption, and later criticized it as a mistake.

During his service in the Justice Department in 1970, Mr. Rehnquist recommended a constitutional amendment as a response to court challenges to segregated school systems.

He wrote in one memo, "the arguments in favor of doing it by a constitutional amendment heavily predominate" over the enactment of a statute, because "what is validated by statute may likewise be invalidated by repeal. * * *"

In a second memo written 2 days later, he elaborated that the language of such an amendment ought to substitute the "classical due process 'rational connection' test for a test of

actual intent," reasoning that "it is simply not feasible to try, as an issue of fact in a law suit, the intent of a multi-member school board."

Mr. Rehnquist's subsequent career on the bench has not deviated one iota from that 1970 reasoning. Despite the finding by the Court that a discriminatory outcome is a sufficient basis to alter public policies, Justice Rehnquist has pursued the reasoning of Deputy Attorney General Rehnquist in a series of dissents demanding proof of intent to discriminate.

In a 1973 dissent in the Keyes case, which challenged de facto segregation in Denver, CO, schools, he wrote that the Constitution does not "require school boards to affirmatively undertake to achieve racial mixing in the schools." He has continued to insist that specific intent to discriminate be proved in virtually any vindication of 14th amendment rights, no matter how much the result may discriminate. Adoption of his view would hinder a constitutional right meaningless. Because a right which cannot be enforced is a right which does not exist.

□ 1610

Many Americans, including high public officials, held views similar to Mr. Rehnquist's in the 1950's and 1960's. As our society has changed, most of them have also changed. But not William Rehnquist. What is most striking and disturbing about him is the rigid consistency of his views on minorities, especially racial minorities, long after times have passed him and his views by.

One searches in vain for some evolution, some moderation of his views, some balancing action to his earlier embrace of segregation. Sadly, as Mr. Rehnquist himself confirmed, one finds nothing. In response to a question during the hearings, he said he could not recall a single civil rights statute that he had publicly supported.

Since joining the Supreme Court in 1971, Justice Rehnquist's opinions and other writings have confirmed his hard, unyielding hostile attitude toward minorities.

According to the Leadership Conference on Civil Rights, a detailed analysis of his record on the Court reveals that:

In the 83 cases in which Justice Rehnquist has participated in which there has been disagreement within the Court as to the interpretation or application of a 20th Century Civil Rights statute (more than a dozen laws covering employment, housing, voting, and federal assistance programs, and prohibiting discrimination on a variety of grounds), Justice Rehnquist has joined on 80 occasions the interpretation or application least favorable to minorities, women, the elderly or the disabled; in two more, his interpretation was less favorable than that adopted by the majority and in only one did he vote for the interpretation advanced by the civil rights plaintiffs.

These statutory cases are . . . particularly important to an understanding of Justice Rehnquist's approach to civil rights cases, for a number of reasons:

(a) because these cases involve the interpretation of statutes, a justice's constitutional philosophy should have little impact on his/her decision.

(b) Justice Rehnquist's asserted concern, in constitutional cases, to avoid if possible overriding the will of the majority as expressed in the challenged legislation should have no bearing in these cases where the Court is asked to enforce the majority will as expressed by Congress.

(c) before he became a justice, Mr. Rehnquist on several occasions expressed opposition to adopting civil rights measures.

One of these cases, Bob Jones University versus United States is especially troubling, both because it is so recent and because Justice Rehnquist's lone dissent seems so wrong, so strained, so demonstrative of his inability to give expression to any civil right.

In that dissent, Justice Rehnquist not only chose to ignore the very clear choices the Congress had made not to overturn the IRS efforts—and even he was forced to admit that congressional action on this score did not comport with this preferred point of view—he reached out to suggest that if Congress wanted to do so, it could and perhaps even ought to enact legislative language enshrining racist schools as a common law charity.

Speaking for the Court in Bob Jones, Chief Justice Warren Burger wrote:

There can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of *Plessy* v. *Ferguson;* racial segregation in primary and secondary education prevailed in many parts of the country . . . The Court's decision in *Brown* v. *Board of Education* signaled an end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

An unbroken line of cases following *Brown* v. *Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.

That is the end of the quotation by Chief Justice Burger who, when he wrote those words, wrote for every other Justice of the Supreme Court, except one, except for Justice Rehnquist.

And Chief Justice Burger wrote for more than just the Supreme Court. The overwhelming majority of the American people, the overwhelming majority of the Congress, including members of both parties, all agree that racial discrimination in education violates a most fundamental national policy.

Justice Rehnquist alone does not join this view, nor share the view of Justice Burger and the other members of the Court. Rather than moderating over time, his judgment has, if anything, hardened.

To those who say that Justice Rehnquist's support for segregation in the 1950's and the 1960's is a thing of the past, the Bob Jones case stands as an effective response. That decision came in the 1980's, a dozen years after he joined the Supreme Court.

The Judiciary Committee hearings focused heavily on Mr. Rehnquist's role in the voter challenge program in Phoenix in the 1960's, to which I have already referred. To me, the significance of these events lies primarily in their confirmation of his attitude toward black and other minority Americans.

Standing alone, his participation in this effort is insufficient to deny him the position of Chief Justice, even if one accepts the version of events most adverse to him. But as another link in an unbroken chain of hostility toward minorities, his participation is compelling evidence, especially when what was at stake was the fundamental right in a free society—the right to vote.

On September 8, 1986, the American Civil Liberties Union, which takes no position respecting the confirmation process, released a detailed report on the civil liberties record of Justice William Rehnquist.

I would like now to quote from the summary contained in that report:

Two propositions are central to Justice Rehnquist's civil liberties record and the degree to which his views differ from those of every Justice with whom he has served on the Court.

First, he believes that it is far worse to hold a statute unconstitutional than to deny an individual his/her civil rights. Second, he believes that the Bill of Rights as applied to the states prevents them from encroaching on the rights of individuals only when the state action is "irrational."

In Justice Rehnquist's opinion, the primary responsibility of the Supreme Court is to protect the freedom of action of the states against the action of the federal government and the claims of rights by individual citizens. In interpreting federal legislation or actions of the federal courts which affect the powers of the states, he interprets the constitution so as to preserve state autonomy. In dealing with individual liberty, on the other hand, he does not believe that the courts should go beyond the literal words of the Constitution or the original intentions of the Framers.

Thus, he rejects the view that the Supreme Court has a special obligation to defend individual liberty and rejects the position, often expressed in the opinions of the Court, that the Bill of the Rights as a whole, and the First Amendment in particular, have a favored place in the Constitutional scheme.

This approach to the Constitution—viewing it as the creation of the majority whose primary objective was to preserve the power of the States—also determines Justice Rehnquist's view of the Civil War Amendments. Every other sitting Justice has come to accept the position that the Fourteenth Amendment "incorporates" the major provisions of the Bill of Rights and therefore requires the states to observe these limits on governmental action to the same degree that the federal government is limited. Justice Rehnquist, in marked contrast, views the civil War Amendments as having only very limited Applicability. Writing on a clean slate, Justice Rehnquist would reject the doctrine of incorporation entirely and would permit the states to restrict the liberty of their citizens within limits prescribed by their state constitutions and those few rights in the federal constitution that apply explicitly to the states. Justice Rehnquist mentions this position only in passing in his opinions, and focuses instead on the very narrow reading that he would give to the applicability of the Bill of Rights to the states.

The civil liberties record of Justice Rehnquist is most succinctly summarized in his opinion of how a justice should weigh the relative harms of denying a person rights under the Constitution and striking down a legislative act in Furman versus Georgia:

An error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chose legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

That is the end of the quotation of Justice Rehnquist. I now return to the Civil Liberties Union summary.

To the extent that the Bill of Rights and the Civil War Amendments were designed precisely to limit the popular will when it impinges on individual rights, Justice Rehnquist's view is inconsistent with the functional purpose of the Bill of Rights and the generally accepted role of the federal courts in enforcing it.

Some in this debate have urged that Senators not weight ideology or philosophy when considering judicial nominations. But nowhere in the Constitution or in our laws or in our tradition are either the President or the Senate prohibited from considering philosophy or ideology. The President plainly and openly does so. Any Senator may, if he or she chooses, do so as well.

The question itself involves a kind of situational ethics which brings out the worst in both sides. When a liberal like Abe Fortas was nominated for Chief Justice, conservatives argued that ideology must be considered while liberals said it should not be. Now that the conservative Justice Rehnquist is nominated, their positions on the question have been reversed, thus undermining the credibility of both sides.

For me the decisive standards for us to consider was set by Justice Rehnquist himself, when in response to a question by Senator SIMON at the recent hearings he said:

• • • Have I fairly construed the constitution in my 15 years as Associate Justice?

To answer that question one must necessarily examine the Justice's view of the Constitution, the Court, and their roles in our society.

We must inquire into his philosophy, study his judicial decisions, and search the underlying premises he brings to the Court.

Nobody denies, least of all Justice Rehnquist himself, that he is a man of strongly held opinions about the proper role of Government and about the undesirability of nonelected judges arrogating to themselves powers which are properly within the province of the popularly elected branches of Government.

Such opinions represent no bar to confirmation. No sensible person would claim that a nominee to any court ought to be so free of opinions as to present a blank slate.

All the judges on the Court have ideas, opinions, philosophies and predispositions, just like everyone else. Nor is the document they are sworn to uphold a mathematically precise blueprint which need only be read for the meaning to become clear.

Constitutional phrases such as "due process of law" and "equal treatment under law" have no innate content. Content derives from existing circumstances, judicial precedent, traditional practice, and the philosophy of the individuals construing the words. Constitutional precision is reserved for relatively trivial matters—like the minimum age of the President.

Judges can no more avoid importing their beliefs and priorities into the Constitution's general commands than they can avoid thinking. So the argument that we cannot examine or take into account a nominee's philosphy seems to be a way of saying we cannot take anything at all into account.

As a former Federal judge, I am acutely conscious of the importance of preserving both the reality and the appearance of independence on the part of the judiciary. Judges ought not be required to advise in advance what judgments they may reach; nor should they be held to account for opinions they have delivered.

Under our system, the independence is secured by lifetime tenure and constitutional proscriptions against reducing judges' salaries. Judges are immunized against retribution for their actions on the bench.

But neither Justice Rehnquist's independence nor his future integrity are compromised by a debate over his work on the Court. Indeed, it is hard to see what could be more proper than to judge his fitness for the prospective post by the qualities he has exhibited in his current post.

On the Court, Justice Rehnquist has consistently pursued the primary goal he sees for the Constitution: The goal of preserving the political institutions which serve to define and establish majority rule.

In describing his view of the relative role of the judiciary and the legislatures, Justice Rehnquist has rejected the idea of a living Constitution—which is to say a constitutional interpretation that changes as times and circumstances change.

In contesting that notion as an "end run around popular government," Justice Rehnquist concludes that the Framers of the Constitution did not intend the Constitution itself to suggest answers to the problems their descendents would face. He contends that the limited view of the Founders was that the legislature and executive were intended to fulfill that role, not the language of the Constitution.

Last month, Justice Powell, a Republican, a conservative appointed by President Nixon, told the American Bar Association that the Supreme Court "has well discharged its responsibilities to safeguard the liberties of the people."

The view of the Court's role and responsibility is shared by all but one of the other Justices of the Court, and by most Americans. It is one of the bases of the extraordinary regard in which the Supreme Court is held by our people.

The only Justice who does not share that view is William Rehnquist.

He views the Court's role as being one of preserving the framework within which the articles of the Constitution can be used to sustain majority rule, but in which the amendments to the Constitution—most notably the first 10 which make up what we know as the Bill of Rights—do not figure prominently.

In other words, he seems to believe that it is the Court's role to see to it that the mechanical functions of the governmental branches perform as they are supposed to—hence the enormous deference to legislatures, especially State legislatures—but that the purpose for which this machinery has been erected is beyond the scope of the Court's authority.

To quote him directly:

The role of the judiciary is to police the structure of government set out in the Constitution to ensure that no branch or level of government exceeds its authority. The judiciary should not interfere with the majoritarian process of decision-making on substantive issues. • • • It is only success within the majoritarian process that can give substantive values legitimacy. ["The

Notion of a Living Constitution", 54 Texas Law Review (May, 1976)]

□ 1630

One problem with this formulation is that it presupposes that the structures through which the majority speaks give each individual an equal voice. But we know for a fact that this was not historically true for blacks and remains only formalistically true today for the poorly educated and economically disadvantaged. And, of course, Justice Rehnquist's view ignores the fact that the Bill of Rights specifically withdraws certain areas from the majoritarian process, and that it has been the historic role of the Federal courts, particularly the Supreme Court, to protect those minority rights, however strong or passionate the attitudes of the majority of the time.

There are some rights that every American holds that are not subject to majority will. There are some rights that every American holds that will be held inalienable, cannot be challenged, cannot be overridden, no matter how many votes are cast the opposite way. It is a truth that Justice Rehnquist's entire record overlooks and ignores.

Justice Rehnquist's formulation seems to set up a social ideal based on competition for influence and success in propounding a point of view. If no moral values can be ascertained except those that a legislature enacts, then the ultimate value must be numerical.

Fifty-one percent of anything is good and less than 50 percent of anything else is bad.

I do not regard this as an acceptable point of view for the Chief Justice of the United States, and in any event, it is not what the Constitution says.

Justice Rehnquist regards the Bill of Rights as a series of limitations placed on the branches of Government, but which—

Were not themselves designed to solve the problems of the future, but were instead designed to make certain that the constituent branches, when they attempted to solve those [future] problems, should not transgress those fundamental limitations. [Ibid. P. 26].

No more effective way to drain meaning from the Constitution has been devised. For if the Bill of Rights, the first 10 amendments, the heart of the liberty of Americans, must be read only as an eighteenth-century political compromise designed to allay fears that the new central Government would intervene in the States' existing rights, then virtually our entire judicial history must be disregarded as a mammoth misunderstanding.

Justice Rehnquist's record mirrors that belief. In Buckley versus Valeo (1976), Justice Rehnquist wrote:

The limits imposed by the First and Fourteenth amendments on governmental action may vary in their stringency depending on the capacity in which the government is acting. * * * I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the states by the Fourteenth Amendment, but rather that it is only the "general principle" of free speech * * * that the latter incorporates.

In a 1980 speech, noting that according to an opinion poll, 70 percent of the public supported repealing the Bill of Rights, he contended that while that might be "unwise," he say nothing to "make this an illegal, an immoral, or an improper act."

I disagree. Repealing the Bill of Rights would not only be unwise. It would be immoral and improper for our society.

But even when the question of Justice Rehnquist's view of the Bill of Rights is set aside, his claimed deference to majority opinion as expressed in statutory law does not lead him to defer to that majority, acting through their elected representatives in Congress, when the subject is civil rights.

As I earlier stated, since 1971 the Supreme Court has disagreed, to some extent, on the application of Federal civil rights statutes in 83 specific cases. According to Justice Rehnquist's own frequently expressed standards, such statutes—the civil rights statutes—embody the majority will of the people through their legislature, and should only be set aside under constitutional compulsion.

Yet in spite of his repeated verbal deference to the judgments of the majority as expressed in statutory law, in 80 of those 83 civil rights cases, Justice Rehnquist joined in or wrote the dissenting opinion which most severely curtailed the exercise of the legislative majority's powers.

In other words, his view is that we must defer to the will of the majority as expressed by legislative action—except when civil rights are involved.

This unwillingness, indeed this virtual inability to ever support the existence of civil rights, even when it causes him to contradict his most cherished principle of the proper role of the Court, is the most distressing and least defensible aspect of Justice Rehnquist's record.

It is beyond dispute that Justice Rehnquist has a brilliant mind. It is equally beyond dispute that, as to civil rights, it is a closed mind.

A century after the enactment of the Twenty-fourth amendment, which reads: "* * * nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person * * * the equal protection of the laws.", Justice Rehnquist limits the reach of the amendment to instances of racial discrimination alone, and even then, only when such discrimination is the official policy of a State.

In all other instances, whether they involved women, the disabled, the elderly or any other group disadvantaged in our society, Justice Rehnquist believes, as he wrote in Weber versus Aetna Casualty & Surety Co. (1972), that—

The Equal Protection Clause of the Fourteenth Amendment requires neither that the state enactment be "logical" nor that they be "just" in the common meanings of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved.

To support that conclusion, Justice Rehnquist has reached back to an 1872 opinion which said:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.

But while he acknowledged that this prediction had been disproved by over 100 years of judgments, he rejected that century of jurisprudence in favor of his own preference for the 1872 prediction.

Such a preference is not illegitimate in itself. But unless we turn the history of the country on its head, we cannot conclude that all prior decisions are equally relevant. Neither Dred Scott nor Plessy versus Ferguson today commands either adherence or defense.

The 1872 cases to which Justice Rehnquist referred were the first in which the Court considered the claim that the 14th amendment imposes any but the most minimal constraints on the States.

It is not surprising that that Court responded to those claims in a narrow way. The full extent of the First Amendment was not determined in its first test before the Court.

But that does not discredit the concept of a living Constitution, the concept of an evolving standard of judicial interpretation. Indeed, American history is to the contrary. The framers did not envisage the inclusion of women or slaves in the ranks of those with suffrage. The barons who forced Magna Carta upon King John seven centuries ago never thought it would or should protect ordinary peasants. Yet who today in 20th century America would suggest that peasants are without rights, who would defend slavery, who would exclude women from the vote?

The attempt to place the dead hand of the past on our efforts to cope with comtemporary problems finds little serious support now, or even in that same past.

□ 1640

Justice Marshall's claim that a constitution must be "designed to approach immortality as nearly as human institutions can approach it" seems to me a closer and more accurate reflection of the views of the Founders, with whom he was contemperaneous, than the narrow view of

Justice Rehnquist, that justice and liberty can only reach "constitutional status by virtue of the fact that they have been initially recognized and protected by state law . . ." [Paul versus Davis (1976)].

A persistent effort to import other values—numerical majorities, popular opinion, traditional preference—over those embodied in the Constitution remains a hallmark of Justice Rehnquist's jurisprudence.

Whether his conclusions spring from his historical understanding or his belief that no value exists except as it gains some kind of "generalized moral righteous or goodness . . . because [it has] been enacted into positive law" [ibid. p. 26], I believe his view does not represent either contemporary understanding or the original intent of the Founders of our Constitution.

The Constitution displays no overt preference for one form of economic arrangement over another. It does not explicitly say that the due process of law must require proof of guilt beyond a reasonable doubt. The Constitution contains no ban on child labor nor a preferred role for the single-earner family.

But to infer from its broad commandments that it is a value-free document void of any prescriptive intent is a leap of faith, not logic.

The Constitution is not limited to establishing procedures by which we may reach consensual agreements about economic arrangements, social policy, and labor law. It embodies profoundly value-laden preferences for certain kinds of human liberties and is silent about others.

The Constitution prefers democracy to autocracy and theocracy. It withdraws from the majority the power to alter the conditions under which the minority may preserve itself. It balances every grant of authority with a countervailing power lodged elsewhere. It exists against an explicitly acknowledged context, set forth in the Ninth Amendment, of inherent human rights held by every American.

And by its demanding terms for amendment, the Constitution at least implicitly lays a claim for its system of values on the future.

That set of values has been accepted by two centuries of American generations and continues as a living reality today.

When Justice Rehnquist asks:

> How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from the popular will, to declare invalid laws duly enacted by the popular branches of government?" [*Furman* v. *Georgia* (1972)]

He is framing one of the enduring questions posed by our system.

But when he answers that "human error on the part of the judiciary * * * wrongfully depriving the individual of rights secured him by the Constitution" [ibid.] is worse than an error which mistakenly sustains the individual's claim, he parts company with me and with the historic and the contemporary understanding of the function and purpose of the constitutional system.

I conclude that Justice Rehnquist is so totally hostile to the rights of women and minorities, that his mind is so closed on the issues of race, that he does not sufficiently share the common recognition of the Supreme Court and the Constitution and their roles in our system to serve as Chief Justice of the United States. I will, accordingly, vote against his confirmation.

Mr. KENNEDY. Mr. President, will the Senator yield?

Mr. MITCHELL. I yield the floor.

Mr. KENNEDY. I was wondering if the Senator would yield for a question?

Mr. MITCHELL. Yes, I will, Mr. President.

Mr. KENNEDY. Mr. President, during the excellent statement of the Senator from Maine, he referred to the issues raised in the Laird versus Tatum case, in which Justice Rehnquist, who was, in 1969 serving in the Office of Legal Counsel, drafted a memorandum dealing with the army surveillance of civilians. That memorandum has been examined by the members of the Committee on the Judiciary as a result of an agreement that was worked out with Senator LAXALT and the Justice Department. We later learned that it appeared in the public record in 1974. In 1974, Mr. Rehnquist appeared before Senator Ervin's subcommittee Senator Ervin asked then-Assistant Attorney General Rehnquist about his views about the Government surveillance policy for military surveillance of civilians. In the first round of questions, Mr. Rehnquist commented on his own basic view about first amendment rights and was quite circumspect about whether the activity was constitutional or not constitutional. He certainly gave the impression that he believed that the actions of the military and the FBI during the antiwar demonstrations did not violate the first amendment rights or chill first amendment rights by demonstrators.

Then, in the second round of questions, Senator Ervin asked him specifically about the Laird versus Tatum case and Mr. Rehnquist indicated that he did not believe that Mr. Tatum had a justiciable right to raise this matter in the courts. Tatum motion to dismiss prevailed in the lower Federal courts against the Government's and then the matter came before the Supreme Court.

Justice Rehnquist and the Laird versus Tatum case got to the Supreme Court together. Justice Rehnquist ruled in favor of Mr. Laird and cast a deciding vote which dismissed the case.

I know the Senator is familiar with the fact that it was after the decision was issued that the question of recusal was raised by the respondent.

In response to the motion for recusal Justice Rehnquist issued a memorandum in which he said he thought he was under a duty to sit.

I know the Senator from Maine is familiar with the letter from Professor Hazard commenting on the judicial ethics involved in that situation. He found it incomprehensible that Justice Rehnquist could possibly have found a rationale for his sitting on that case. I have in my hand a letter from the Society of American Law Teachers, a distinguished organization, that reached the same conclusion.

I ask unanimous consent that this letter to the Members of the U.S. Senate be printed in the appropriate place not to interfere with this discussion.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

SOCIETY OF AMERICAN LAW TEACHERS,
Davis, CA, September 13, 1986.

Members of the U.S. Senate,
Washington, DC.

I write on behalf of the Society of American Law Teachers (SALT) to oppose the nomination of William H. Rehnquist to become Chief Justice of the United States. The Society of American Law Teachers is a membership organization of individual law professors. We are unique among organizations in legal education because we represent the views of individual teachers, rather than those of our affiliated institutions. Our opposition reflects the unanimous opinion of the members of the Board of Governors at the end of an extensive internal debate.

We fully recognize the President's power to select a Chief Justice who shares his own political views. Our objection to this nomination does not stem from political opposition. Our views rest instead on two grounds. First, we have concluded that the serious questions of ethical impropriety arising from Justice Rehnquist's participation in *Laird* v. *Tatum* simply cannot be resolved in his favor. Secondly, we have grave reservations about his record of demonstrated hostility to the constitutional ideals of equality and individual rights.

We turn first to the question of integrity and ethics. We have found it difficult, to overlook the serious questions of credibility arising from the nominee's disturbing memory lapses concerning controverted matters of the gravest national importance. Our concern here rests not on a single occurrence, but rather on a cumulation. We find it difficult to avoid the conclusion that Justice Rehnquist has failed to meet the test of Canon 2 of the Code of Judicial Conduct which requires that he conduct "himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." We have read the opinion letter of September 8, 1986 from Professor Geoffrey Hazard to Senator Charles Mathias, and the comprehensive analysis of Professor Floyd Feeney and Mr. Barry Mahoney. Professor Hazard notes that Justice Rehnquist "had a duty of

candor to the Senate in answering questions concerning *Laird* v. *Tatum* * * * (he) complied with (that) duty only if his statement is accepted that he had 'no recollection of any participation in the formulation of policy on the use of military to conduct surveillance.'" Professor Hazard observed that "whether that statement should be accepted is a matter of judgment." It is the judgment of the Society of American Law Teachers that this lapse *cannot be accepted.*

We are guided by our roles as teachers of the future lawyers who will serve the citizens of this country. We are concerned that the message we will send to the next generation of lawyers is one of cynicism for law. Our concern in this regard extends as well to members of the general public. Today the honesty and integrity of every lawyer is subject to doubt in the minds of many members of the public. We fear irreversible damage to public confidence in the integrity of the judicial branch if Justice Rehnquist is confirmed. The office of Chief Justice is unique in our constitutional government. Only 15 citizens have served this country in that capacity. The Chief Justice must embody the spirit of our highest aspirations for honest, impartial judicial conduct. Both our students and the general public will find much to confirm the cynicism about which we are concerned. We have come slowly, and painfully to the conclusion that the honesty and integrity of this high office will be seriously degraded if this nominee is confirmed.

A second, and equally critical factor in our decision to recommend that you withhold your consent from this nomination, is our concern that the candidate has a consistent, demonstrated hostility to the constitutional values of equality. We base our view in this regard upon our assessment of his non-judicial conduct. The confirmation hearings revealed many things about the Justice's conduct before he joined the Court. We are disturbed by the contradictions of eyewitnesses concerning Justice Rehnquist's involvement in partisan challenges to minority voters. We are disturbed by the reports of memoranda prepared by the Justice while he was a law clerk and in a second instance, while he was an Assistant Attorney General in the Justice Department. In the first instance, he is reported to have stated the view that *Brown* v. *Board of Education* was wrongly decided. In the second instance, he is reported to have expressed views concerning the role of women in the family that are so extreme as to undercut our confidence in his fidelity to the constitutional ideal of equality.

For all of the reasons stated above, we urge you to withhold your consent, or in the alternative to return this nomination to the Judiciary Committee.

Sincerely,

EMMA COLEMAN JORDAN,
President.

Mr. KENNEDY. The Senator from Maine is a former judge—and I think perhaps no one else in this body would bring to this particular issue the kind of background and experience that the Senator from Maine can bring. I am wondering whether he feels that the decision by Mr. Rehnquist to sit in this case, after he expressed an opinion that the case was without merit, was a proper decision. I wonder if the Senator from Maine were a plaintiff in that particular case and he was sitting in court and saw that one of the judges before him had made a statement at a congressional hearing saying he did not have a case, whether he would feel he was going to get fair and equal justice in that particular court.

Mr. MITCHELL. Mr. President, I think it goes without saying that the plaintiff in that case must have felt that he would not receive fair and equal justice. If I may, with the Senator's permission, read a couple of sentences which I read during my remarks and this will amplify them. After recounting at some length the Laird versus Tatum circumstances, I said:

I find this episode troubling, because a judge, above others, ought to be impressed with the importance of abiding by the spirit as well as the literal letter of the law.

I conclude that Justice Rehnquist made a mistake, a serious error in judgment, and that he would act differently if he had to do it over again. But I do not believe that this one mistake is sufficient in itself, nor does it fit into a pattern of such errors, to disqualify him from serving as Chief Justice.

□ 1650

All members of the Judiciary have a special responsibility to not only act impartially and dispassionately but to give the appearance of acting impartially and dispassionately. It is a primary obligation; when any human being is given the enormous power that Federal judges have in our society, to sustain public support for our judicial system we simply must insist that judges act fairly, appear to act fairly, act impartially and appear to act impartially, and that it is a serious mistake for any judge to sit on a case in which he or she has previously been involved and on which the judge has a strong view. I believe, as I said in my remarks, this was a serious error in judgment by Mr. Rehnquist.

Mr. KENNEDY. I thank the Senator. Just to continue on the Laird case, Professor Hazard mentions this in his excellent letter when he is talking about the matters which were being considered in the case. He says in his letter on page 3 in the bottom paragraph:

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting references to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in *Laird* v. *Tatum*, Justice Rehnquist had not forgotten his involvement in the surveillance policy negotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Court. In such a matter, a lawyer or judge is expected to give the whole truth.

And then he continues:

Finally, Justice Rehnquist had a duty of candor to the Senate in answering the questions concerning *Laird* v. *Tatum.*

Mr. MITCHELL. I think Professor Hazard was making two points with which I agree. The first is that in this particular case Justice Rehnquist made two errors in judgment. The first was to fail to abstain from participating in deciding the case in which he had been involved prior to entering the court and on which he had already expressed an opinion as to what the outcome should be.

The second was in writing his memorandum explaining his decision, justifying his decision, he did not set forth all of the facts, particularly those which were peculiarly known to him and might not have been known to either of the parties. That is a special burden on a judge under these circumstances. By virtue of his or her unique position, a judge may be in possession of facts affecting his or her impartiality, either the fact of impartiality or the appearance of impartiality or both, of which the parties may not be aware. And a judge then has a special responsibility under such circumstances to disclose to the parties those facts as not only explaining his decision but providing the parties with full information as to the basis for a decision. I believe Professor Hazard is correct and I share that conclusion, that there was not only the initial error in the failure to abstain from the case but the second error of a memorandum of explanation which did not fully disclose facts known to the judge at the time and possibly not known by the parties.

Mr. KENNEDY. I thank the Senator for his elaboration on this point because I think his explanation and illumination on this issue is particularly helpful to our Senate colleagues. I am also reminded that Senator Ervin, who took great interest in this issue, at the time when Justice Rehnquist refused to recuse himself, including filing an amicus curiae brief in the Supreme Court, expressed his strongest disappointment in Justice Rehnquist's action. Senator Ervin noted that, if he had known in advance that Justice Rehnquist would participate in the Laird versus Tatum case, he would not have supported his nomination for Supreme Court Justice. This statement by Senator Ervin gives an indication of the importance and significance of this kind of activity by Justice Rehnquist.

I welcome the Senator's comments. I think in his memorandum of explanation for not recusing himself, Justice Rehnquist, in his references to his exchanges with Senator Ervin, did not include the specific language on the Laird versus Tatum case. As to the Canons of Ethics, which had just been issued, there was a complete misinterpretation of those, to permit him to reach his conclusion on the duty to sit. I welcome the comments of the Senator from Maine and also the letters from Professor Hazard and the Socie-

ty of American Law Teachers on this issue. They should be carefully reviewed by all Senators before making their judgment on this nomination. I thank the Senator for an excellent statement.

Mr. President, next year, America will commemorate the 200th anniversary of the Constitution. In that document and the bill of rights, the Founders established a society based on individual liberty, equality, and the rule of law. In the two centuries since then, the American people have worked hard to advance the noble values embodied in the Constitution and make them a reality for all Americans. We have weathered many storms, including a civil war that nearly destroyed the Nation, but in these 200 years, we can be proud of the strides we have made toward realizing the goals of the Constitution.

Nearly from the beginning, the Supreme Court established itself as the ultimate Guardian and interpreter of the Constitution. In the final analysis, it is the Justices of the Court who give meaning and life to our liberties. The Chief Justice, as the leader of the Court, sets the standard for defining the Constitution and interpreting laws. The office itself is a constant symbol of the fundamental values upon which America is built, and the protections which we rely on for our freedom and justice.

The Supreme Court building itself restates this important truth. At the entrance to the building, inscribed in the pediment above the majestic pillars, are four simple eloquent words—"Equal Justice Under Law."

Now, however, the Senate is being pressed to confirm a Chief Justice whose entire career has been an impediment to those noble words.

The nomination of William H. Rehnquist to be Chief Justice of the United States places us at a crossroads in our history. We must give the mantle of leadership only to someone who has embraced our historical commitment to religious liberty and freedom of expression and our historical progress toward the elimination of discrimination based on race, sex, nationality, and economic status. Justice Rehnquist falls far short of this critical standard. If we confirm Justice Rehnquist to be Chief Justice, we will elevate to the pinnacle of our American Judicial system a man who by word and deed throughout his career has shown disdain for the fundamental values embodied in our Constitution. If we consent to the nomination of Justice Rehnquist to be Chief Justice, we will be choosing as the symbol of American Justice someone who would roll back the hard won progress of women and minorities to achieve full equality and would strip away essential protection from Government interference in highly personal decisions about religion, marriage, and family.

The struggle of racial minorities to achieve their rightful place in our society has been long and often bitter. For racial minorities, particularly blacks, equal protection of the laws was, until very recently, a hollow slogan. As recently as 1959, a negro was hauled from a jail in Mississippi and lynched, one of 3,441 negroes to fall victim to this form of mob violence, unhindered by law enforcement officials. During the 1960's, peaceful civil rights demonstrations were subject to excessive force by police, and were often assaulted by private citizens as law enforcement officials looked on. In St. Augustine, FL, for example, a negro girl was stabbed with the end of a stick, and when she and another marcher fell on the ground, they were arrested immediately for disorderly conduct. It was common for the victims of violence, not the perpetrators, to be taken to jail.

Negroes accused of crimes could not expect a fair trial. For example, in 1965, it was common practice in Talladega County, AL, for the prosecution and defense in a case to get together and decide whether they wanted any negroes on the jury—if not, they would just agree to strike them. No negro had ever served on a jury in the county. The use of preemptory challenges to exclude blacks from juries is widespread. The Supreme Court at last put an end to this practice last term. Justice Rehnquist, dissenting in that case, would perpetuate race discrimination in our justice system by allowing prosecutors to strike blacks from a jury because of their race.

In education, minorities suffered the discrimination of government sanctioned segregated schools until the middle of this century. Inferior education is the essence of the iron ring of discrimination against minorities. By limiting their opportunities for self-improvement it makes and keeps them inferior. Inferior status provides the justification for laws and customs which penalize minorities.

In the wake of the Brown decision, desegregation of schools was met with massive resistance in the South. A key element of Southern resistance was the creation in the 1960's of private white schools to circumvent desegregation orders. In 1970, the IRS began to withhold tax exemptions from these private segregated schools. In 1983, in the Bob Jones University case, the Supreme Court upheld the Government's refusal to subsidize segregated schools. Justice Rehnquist alone dissented.

Women in America are fighting a difficult battle in eradicate sex discrimination in our society. Although sex discrimination is often more subtle than other forms of discrimination, it is no less destructive. Innumerable legal obstacles still exist to full equality of men and women in America. Justice Rehnquist is committed to perpetuating much of this discrimination. He is the only member of the Supreme Court who believes that the Government can discriminate against women in selecting juries, deny unemployment benefits to an unemployed woman who is seeking work if she is pregnant or has recently given birth, or give smaller housing allowances to married women in the Armed Forces than to married men.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. COCHRAN). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

□ 1700

Mr. KENNEDY. Mr. President, the most important measure of good government is how well it protects the weakest and most powerless. Most important among these are our Nation's children. In recent years, the Court has endeavored to blunt the social stigma of illegitimate children by prohibiting laws which single out these innocent children to disadvantage them. These children truly are victims of their parent's behavior, and there is no justification for laws which further punish them. Justice Rehnquist has voted consistently to uphold statutes which deny illegitimate children the right to inherit from their fathers by intestate succession, the right to child support from their fathers, the right to receive disability or worker's compensation benefits, or the right to benefit from supplemental income programs for indigent families.

The poor are also in need of government protection. Justice Rehnquist's response is to vote, along, to uphold a State statute which Justice Stewart characterized as prohibiting the poor from marrying.

Justice Rehnquist also has voted consistently to uphold statutory schemes that discriminate against resident aliens. Beginning in the late 19th century, States and localities enacted various laws that disadvantaged newly arrived, and often unpopular, immigrants. Many of these laws struck at the core privilege of freedom—the right to seek and obtain employment. Because legal aliens generally are not qualified to vote, they are uniquely vulnerable to discrimination by the majority.

The Supreme Court has repeatedly held these discriminatory statutes unconstitutional. Justice Rehnquist has voted to prohibit aliens who are in this country legally and are eligible to

work from engaging in the profession of engineer or architect, from becoming a notary public, or from holding any State job whatsoever.

For the Founders, religious freedom was the crux of the struggle for freedom in general. James Madison authored the first legislative pronouncement that freedom of conscience and religion are inherent rights of the individual in Virginia's great Declaration of Rights in 1776. Madison opposed every form and degree of official relation between religion and civil authority. For him, religion was a wholly private matter beyond the scope of the civil government either to restrain or to support.

The Founders wisely recognized the historical divisiveness of government entanglement with religion, and the fundamental importance of freedom from such entanglement to the realization of individual liberty. The separation of church and state has been respected by the Court throughout our history.

Justice Rehnquist would tear down the wall of church/state separation. In his extreme dissent in Wallace versus Jaffree, with which no other member of the Court agreed, Justice Rehnquist stated:

> The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing nondiscriminatory aid to religion.

This startling statement flies in the face of our historical commitment to government noninterference in religion.

Due process is the cornerstone of the criminal justice system of a civilized society. It is the basis for preventing intolerable abuses in law enforcement. Justice Rehnquist has voted to strip away some of our most important due process protections. For example, he alone voted a defendant to be sentenced to death on the basis of a secret report which neither the defendant nor his attorney was permitted to see.

I urge every Member of the Senate to reflect on what would become of our precious freedoms if the positions that Justice Rehnquist has taken on these fundamental issues prevailed. He would create a society that none of us would recognize. Living in Justice Rehnquist's America would be a vastly different experience from living in America today. Civil rights and civil liberties would mean little in his society. Our Nation's commitment to bedrock principles of individual liberty and equality for all Americans is not shared by Justice Rehnquist. His vision of America is not shared by most Americans. He does not deserve the privilege and solemn responsibility of being the Chief Justice of the United States.

Mr. HATCH. Let us review the issue we are debating.

If it were a question of qualifications, the debate would be over. It would have been over as soon as the ABA reviewed 200 of Justice Rehnquist's opinions and found that he "meets the highest standards of professional competence." It would have been over when President Carter's Attorney General and President Johnson's Solicitor General endorsed Justice Rehnquist. The fact is Justice Rehnquist has been an outstanding Justice for 15 years. Questioning his qualifications now, is like asking 15 years into his career whether Babe Ruth could hit home runs. This debate has nothing to do with qualifications.

If this debate were about judicial temperament or integrity, it would already be over. It would have been over when the ABA interviewed 180 judges, 50 law deans and professors, and 65 attorneys before stating that his temperament and integrity make him "among the best available" for the office. It would have been over when the Judiciary Committee voted 13 to 5 in favor of appointment. It would have been over when his colleague, Justice Brennan, declared that he would be a "splendid Chief Justice."

This is not a debate about qualifications or integrity. This is not a debate about judicial temperament.

The debate continues only because some Senators and special interests disagree with Justice Rehnquist's legal views. These Senators say their case is not a question of mere disagreement, yet they proceed to call him insensitive on civil rights solely because he differs with their views. They say disagreement is not the issue, yet they say Justice Rehnquist considers women "second class citizens" only because he differs with their extreme and narrow view of equal rights.

CIVIL RIGHTS REBUTTAL

We continue to hear charges of insensitivity to civil rights. It is accurate to say that Justice Rehnquist disagrees with some of my colleagues about the outcome of many civil rights disputes. It is not accurate to describe his record as "insensitive." Let me briefly recount his record on civil rights:

First, over 34 times he has upheld and reaffirmed the landmark Brown versus Board case which held that racial classifications are stigmatizing and that "separate but equal" is unconstitutional.

Second, over 27 times he has voted to sustain minority and women's rights.

Third, he wrote the landmark womens rights case, Meritor Bank, which held that an employer may be held liable for sex harassment in the workplace.

Fourth, he has consistently defended the principle that the Constitution is colorblind. This defense for a race-neutral Constitution and society is what causes much of the concern amongst those who disagree with him. They would prefer to have the Constitution justify preferential treatment for some citizens through quotas, busing, and effects tests that invalidate legitimate State actions or require reverse discrimination. They want preferential treatment and quotas: Justice Rehnquist has carefully read the law to require color blindness—a total absence of race as relevant criterion for any government purpose.

Fifth, a study of the 1986 term showed Justice Rehnquist was clearly in the mainstream of the Supreme Court on civil rights issues. On the 20 civil rights cases studied, he voted with the majority 70 percent of the time.

BATSON

We began last week to discuss one civil rights case, Batson versus Kentucky, the 1986 jury selection case. Justice Rehnquist's position in this case has been characterized as "preventing blacks and minorities from serving on a jury." This is inaccurate. In fact, in a related 1986 case, Turner versus Murray, Justice Rehnquist prohibits attorneys from inquiring into racial attitudes when screening jurors. In this instance, Justice Rehnquist was simply defending the longstanding principle that an attorney may legitimately make peremptory challenges to jurors, even if the juror was eliminated on the basis of race or ethnicity. This was a policy first articulated by the supposedly liberal Warren Court. Moreover the dissenting opinion which he joined was actually authored by the Chief Justice. The Chief Justice, joined by Justice Rehnquist, recognized that race or ethnicity could affect a juror's decisionmaking in a particular case. Peremptory challenges are undoubtedly applied across the board to jurors of all races and nationalities and accordingly do not evince a deprivation of equal protection to any particular group. Justice Rehnquist is simply stating that the color of a juror's skin should be irrelevant. Jurors are fungible, meaning that they can be interchanged in any combination and the decisionmaking process should still produce the truth. Therefore, these two Justices oppose making race a factor in jury trials. This is the basis for their decision. This is a distant departure from the way this case has been characterized by some of the Justice's critics.

BATSON VERSUS KENTUCKY

One further thought on Batson versus Kentucky. It is both irrational and stereotypical to believe that the defendant has been denied a fair trial

or suffered other prejudice because of the underrepresentation of one group of potential jurors. People do not perceive truth differently because of race or sex or any other arbitrary and irrelevant classification. All persons of all races and both sexes are essentially fungible as jurors. They can be interchanged without any prejudice to the defendant.

If all persons are fungible as jurors, it follows that racial or gender composition of the jury cannot possibly affect the defendant's rights or the outcome of the trial.

Because race is irrelevant to the composition of the jury, it makes no difference legally whether a preemptory challenge is based on race or gender or any other "gut instinct" of the prosecutor. Thus, the ruling in Batson, according to the Chief Justice's opinion, does no harm to the defendant but it does damage the basic notion of preemptory challenges which have been part of the common law for centuries. Preemptory challenges are meant to be preemptory. If a court begins to inquire into the basis for the challenge, to question its racial or gender motives, it no longer is a preemptory challenge, but a challenge for cause.

This is also what concerned the Warren court in the Swain case. No one suggested that this 6-to-3 vote of the Warren court made those Justices "insensitive to civil rights." This is another instance of selective name calling. When the Warren court does it it is warranted; when Justice Rehnquist does it it is objectionable.

RECENT MEMORANDA

In the past few days, we have seen the emergence of a few additional memoranda from the time that Justice Rehnquist served in the Office of Legal Counsel. One of these memos dealt with the equal rights amendment. This memo was prepared in response to a request from the White House for a paper setting forth the arguments against the ERA. Attorney Rehnquist was simply complying with his client's request by setting forth only one side of the debate. Moreover, on another occasion, his office prepared a memorandum supporting the ERA. At one time or another, he took both sides.

The most recent ERA memo, however, took the reasonable position that the proposed amendment would invalidate many laws designed to provide special assistance or treatment to women and many other laws which simply recognize that men and women are not identically situated for all purposes. There are many examples in both areas. For example, draft laws, child custody laws, labor laws, and others fall into these categories. This memo further notes that the proposed amendment is ambiguous and could prohibit legal and social practices accepted by many who support the ERA because of its simple equality slogan. As we know, these are precisely the legal arguments against the ERA. The most we can conclude from this memo is that legal counsel Rehnquist did his job well years before these precise issues arose to defeat the ratification of the proposed amendment.

Another recent memo from Justice Rehnquist's days at the Office of Legal Counsel discusses the possibility of legislation or a constitutional amendment to make clear that a nondiscriminatory, race-neutral system of school assignment need not be subjected to forced school busing simply to achieve racial balance. The legal analysis of the memo is simply that the Constitution prohibits intentional racial discrimination, not racial imbalance that naturally results from the free choices of private citizens. This is the classic distinction between de jure and de facto discrimination. The Supreme Court has upheld the same distinction found in the Rehnquist memorandum in the subsequent cases of Swann, Pasadena, and most recently Bazemore. The Post article on this memo makes it apparent that the memo advises a race-conscious "freedom of choice" plan, as was rejected in the Goss versus Knoxville case, would remain unconstitutional. If anything this memo must be praised as a testament to Justice Rehnquist's legal foresight.

The amendment considered in the memo would not have foreclosed any alternative to forced busing, it instead added the alternatives of neighborhood school plans. Congress apparently went further in 1974 when the Equal Educational Opportunities Act, 20 U.S.C. 1701, et. seq., declared that "the neighborhood is the appropriate basis for determining public school assignments" and prohibited busing merely to achieve racial balance. Indeed the Senate has gone even further by passing the amendment of Senator JOHNSTON of Louisiana which would have removed busing from the Federal courts.

As might be expected, this memo, too, was prepared for legal counsel Rehnquist's client, the White House. He provided legal advice which discussed the murky caselaw of the time and suggested the sound and moderate alternative of preserving the emerging distinction between de facto and de jure discrimination. The memo apparently noted that a broader amendment could be fashioned "to go all the way with freedom of choice." But this broader course was discouraged by the memo. In short, this memo demonstrates once again Justice Rehnquist's ability to quickly grasp and sort out legal concepts. Moreover his advice was very moderate in the climate of the times and has been vindicated by subsequent policy clarifications.

LUDICROUS

Finally, we have heard about a few issues that are almost ludicrous. One issue of this nature dealt with the Vermont restrictive covenant.

First, unenforceable due to Shelly versus Kramer.

Second, Justice Renquist immediately agrees to correct deeds.

Third, JFK was not considered "insensitive" even though he had such covenants; it would be irresponsible to make this accusation.

CORNELL TRUST

Another issue in this category deals with the Cornell Family Trust. The facts are that Justice Rehnquist set up a trust account in 1961—10 years before he took a seat on the Supreme Court—for the benefit of his brother-in-law, Harold Cornell. The trust was established by H.D. Cornell, Harold's father, for the express purpose of paying medical expenses when Harold's multiple sclerosis made it impossible for him to care for himself. The trust was administered by George Cornell, Harold's brother. H.D. Cornell, the father, specifically instructed his attorney, Mr. Rehnquist, and the trust administrator, George, not to disclose the existence of the trust to his son because he feared that Harold might not preserve the money for its intended purpose. Attorney Rehnquist obeyed his client's instructions impeccably.

Nonetheless, this has formed the basis for allegations that Justice Rehnquist acted improperly in participating in establishment of a trust when he might have some interest (as son-in-law) in the estate. This overlooks that the code of professional responsibility does not bar family cooperation in legal matters, but only requires that the testator initiate the request for legal help and that the testator be aware of the attorney's potential interest as an inheritor. Attorney Rehnquist was in full compliance with these standards. Frankly, the family was grateful that Mr. Rehnquist handled the matter because of its sensitivity and the need for care and confidentiality.

We also hear that Mr. Rehnquist was somehow wrong for not disclosing the trust to Harold. In the first place, Mr. Rehnquist was not the administrator. George was. If anyone had the responsiblility to decide when the trust was to be disclosed, it was George. Moreover, Mr. Rehnquist was obeying his client's orders. It would have been more severe for him to have presumed to break his client's trust. It he had disclosed the trust over his client's objections, I have no doubt that Justice Rehnquist's critics would have been even more vociferous in their attacks on his violation of legal responsibilities. For those seeking some flaw in Justice Rehnquist, he would have been

wrong either way. The facts show that he performed admirably by remaining within his duties as a lawyer.

This is, in reality, a sensitive family dispute. The FBI did a thorough check of the facts and every member of the Cornell family agrees that the purpose for confidentiality was to prevent Harold from invading the trust and spending the assets before they were needed for his medical care. To suggest that Justice Rehnquist kept his client's trust because his wife might benefit from the estate is ludicrous. This issue simply demands no further explanation.

These arguments demonstrate that this debate is about ideology, not integrity. They should be laid to rest for once and for all.

Mr. BINGAMAN. Mr. President, this week we are being asked to confirm the President's nomination of William Rehnquist for Chief Justice of the Supreme Court and the President's nomination of Judge Scalia as an Associate Justice of the Supreme Court. My vote will be to deny the President's request for confirmation of Mr. Rehnquist and to grant the Prsident's request for confirmation of Mr. Scalia.

In Mr. Rehnquist's confirmation hearings some questioned the significance of the position of Chief Justice. They argued that the factual scope of the office, the duties of the Chief Justice compared to those of the Associate Justices, render the office only nominally different from the position Mr. Rehnquist currently holds.

In my view they are wrong. The Chief Justice's power and prestige extends beyond the responsibility of assigning opinion authorship and beyond his role of determining what cases the courts will hear. Rather, the power of the office is closely related to the fact that the Chief Justice presides over our entire judicial system and that he is the most honored figure in our legal system.

Mr. Rehnquist clearly has the intellectural capability to function as the Chief Justice; nobody questions that. Similarly, he has the ability to administer the Court as its Chief Justice. However, I do not believe that Mr. Rehnquist is qualified to carry out the role as the symbol of justice for all our Nation's people. The hearing record shows that his record on civil rights—on equal justice for all Americans—is questionable. Whether the question concerns his authorship and views in the now famous memorandum on Brown versus Board of Education, or his lone dissent in the Bob Jones University case, his positions indicate an unwillingness to apply the 14th amendment in race and gender cases. Moreover, his involvement in Laird versus Tatum raises serious and unanswered questions of judicial ethics—whether Mr. Rehnquist should have disqualified himself from this case. Further, the record remains unclear on charges of voter harrassment by Mr. Rehnquist in the "ballot security" programs in Phoenix in the fifties and sixties.

In short, Mr. Rehnquist's record alienates large numbers of Americans. And in my view the Chief Justice must meet a higher and more complete standard of excellence to maintain the high esteem that the position requires.

As my colleague, Senator EAGLETON, states:

> About a nominee for Chief Justice, we cannot harbor an array of disquieting doubts. About a nominee for Chief Justice, our minds and consciences must be clear and unhesitating.

I agree that this is the test we must apply to the nominee for Chief Justice, and in my view Mr. Rehnquist does not meet that test.

Mr. President, the Senate Judiciary Committee has unanimously recommended the nomination of Judge Scalia as Associate Justice. Nothing in the record before the committee raised questions about his fitness for that position. Based on that record, I will vote to confirm Mr. Scalia.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ROCKEFELLER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROCKEFELLER. Mr. President, our colleagues on the Judiciary Committee have presented the issues concerning the nomination of William Rehnquist in great depth. Some of our other colleagues—Senators LEVIN, EAGLETON, BRADLEY, and MITCHELL—have, and added to our understanding with notable statements.

I do not intend to repeat the arguments that have been made in detail by others. Instead, I would like to summarize the conclusions that I have reached based on the case that has been presented so forcefully—pro and con—by others.

Mr. President, I intend to vote against the nomination of William Rehnquist to be Chief Justice of the United States.

I base my opposition to Justice Rehnquist on his complete hostility to civil rights and individual rights—and his lack of sensitivity to the special role that the Supreme Court, and its Chief Justice, play in protecting those rights.

I base my opposition on an overall sense, obviously subjective, that Mr. Rehnquist, despite his brilliant intellect, lacks the breadth of vision and potential for growth that our country has a right to expect in the Chief Justice.

In our system, Mr. President the legislative branch makes the laws and represents majority opinion. The President gets his mandate from the electoral process, and the majority of the country. But the Constitution protects the rights of minorities and individuals, often against hostile majorities, and it is the special responsibility of the courts to protect those rights which the Constitution provides.

Of course, it is inevitable that reasonable people will disagree, and fairminded judges will disagree, about what the Constitution requires in particular cases. But Justice Rehnquist's record goes beyond the normal range of disagreement that fairminded people and Justices could have. He is uniformly, predictably and inevitably opposed to civil rights, whatever the claim, and always on the side of the state when Government authority collides with the constitutional rights of individuals.

Despite the special, historic role which the Federal courts have in protecting civil rights, it is of course possible to believe in civil rights and equal justice for all, while opposing on philosophical grounds the idea of an activist Federal judiciary.

But that is not Justice Rehnquist's approach. He has not confined his opposition to Federal court action on civil rights. He opposed the historic Civil Rights Act of 1964, and every other Federal civil rights statute; so he does not believe that Congress has a role to play in protecting civil rights. He opposed the efforts in Arizona when the city of Phoenix wanted to pass an ordinance protecting the right of minorities to go into restaurants and other public accommodations; so he does not believe that local government has a role to play in protecting civil rights. Thirteen years after the Supreme Court decided in Brown versus Board of Education that segregated schools were unconstitutional, Mr. Rehnquist offered the opinion that "we are no more dedicated to an integrated society than a segregated society"—an opinion that was legally incorrect and morally wrong.

There is no chink in the armor of his hostility toward civil rights. But the struggle for civil rights has been the central, moral issue of our time. As a country, we have worked so hard and we have worked for so long to translate our concept of equal justice into a reality for all Americans. Having a Chief Justice of Mr. Rehnquist's proven insensitivity would be a serious step backward and not one that I would support.

Mr. President, as I have studied this nomination, I have slowly become convinced that for all his intellectual ability, Mr. Rehnquist is not the kind of

person who should be the Chief Justice of the United States. His dismaying judicial record is troubling enough, but really it is only part of the picture. Mr. Rehnquist seems to be the kind of person who decided very early on exactly what he felt about the world and how he felt about all issues and has never wavered or grown. Most people change their views over time; sometimes they become more liberal; other times more conservative; hopefully, in most cases, more aware of nuance, and complexity. Frankly, I do not see that growth in Mr. Rehnquist; his strongly held, provocative views today are no different than they were in 1952 when he clerked on the Supreme Court: both unshaken and unrefined by anything that has happened in three tumultuous decades.

That lack of growth seems to me to be compounded by the coldness of his ideology and the lack of a generous spirit. He seems intolerant of the kind of diversity than makes this country unique; he seems incapable of trying to strike the genuinely difficult balance that our country relies on the Supreme Court to find between government authority and individual rights. And there is no doubt that my view of Mr. Rehnquist's character and rigidity of ideology is influenced by what I believe to be his lack of candor to the Judiciary Committee and his totally improper refusal to recuse himself in the Laird versus Tatum case.

Supporters of this nomination have argued that the Senate should give great deference to the President's choice, particularly because the American people have twice elected President Reagan with great majorities. This is the first time that I have had the privilege of voting on a Supreme Court nomination, and I have become firmly convinced that every Senator has a special responsibility to reach an individual decision on whether Mr. Rehnquist should be elevated to be Chief Justice. That decision should be based on each Senator's individual assessment of Mr. Rehnquist's qualifications to hold this position of extraordinary responsibility and not the popularity of the President who appointed him.

There have only been 15 Chief Justices in the nearly two centuries since the Constitution was written. Chief Justices stay on while Presidents change, their decisions touching the lives of Americans in very crucial ways, for 15 or 20 or 25 years. Throughout history, the Senate has recognized its special responsibility to consider this nomination; 5 of the 20 men nominated for the position have actually been rejected by the Senate.

The President has won from the American people the awesome right and privilege of selecting, from among 230 million Americans, his choice to nominate for Chief Justice of the United States. And that is all. The Senate has, and each individual Senator has, an absolute right and responsibility to decide whether to "advise and consent" to the President's nomination. That is what the Constitution envisions; That is what our separation of powers is all about.

The Senator from Illinois, Mr. SIMON, made in interesting observation on this nomination last week. Recognizing that Mr. Rehnquist was likely to be confirmed, Senator SIMON expressed the hope that Mr. Rehnquist would take some time on the beach, as he expressed it, to reflect seriously on the criticisms and concerns that have been raised—hopefully, to open his mind and change his views on certain matters.

I wish I believed that were possible. But it does not seem realistic to me any more than it probably did to Senator SIMON.

John Mitchell and Richard Kleindienst gave Mr. Rehnquist a key position in the Justice Department—because of his views.

Richard Nixon appointed Mr. Rehnquist to the Supreme Court—because of his views.

And now Ronald Reagan has nominated him to be Chief Justice of the United States—because of his views.

So there is little chance that, having attained the pinnacle of our system of justice, because of his views, Mr. Rehnquist will change his views now.

And yet despite his ascent, I don't believe that Mr. Rehnquist's view of constitutional rights is shared by most Americans. And frankly, I do not think that it is shared by most Senators.

Mr. Rehnquist is not a fair-minded conservative. He is a closed-minded ideologue. He bears no serious resemblance to the distinguished, conservative Justices appointed by conservative Presidents: John Harlan or Potter Stewart, appointed by President Eisenhower; Lewis Powell or Harry Blackmun, appointed by President Nixon; and, based on the record so far, Sandra O'Connor, appointed by President Reagan.

It appears that opponents of this nomination will total perhaps 25 or 30. but if we were voting on Mr. Rehnquist's view of the Constitution, I would say to my colleagues that Mr. Rehnquist would be lucky to get 25 or 30 votes.

And we should be voting on Mr. Rehnquist's view of the Constitution. That's what this process is all about; not the popularity of the President, and not Republican versus Democratic politics. There are times for Senators to defer to the President. This is not one of those times. Sometimes loyalty demands to much.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

□ 1730

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOLE. Mr. President, it is now 5:30 on Monday, and I would like to hope we could reach some agreement on voting on the Rehnquist nomination tomorrow. Either that or we ought to stay here tonight and debate it because October 3d is not as far away as some might think. If we are going to be denied the right to vote tomorrow, then I think in fairness we should be told we are not voting tomorrow so we can decide what other efforts we might wish to pursue. I get rumors that the press has been told there will be no votes tomorrow. I am not certain that is true. We might have a vote on both Rehnquist and Scalia prior to 4 o'clock. We have now been about 5 days on the nomination of Rehnquist. We find some Senators making additional speeches on the same subject. We will have a full RECORD of that. I guess some made two or three.

I really believe we have reached the point now where we are holding up the entire Senate program. No one has complained about the debate. We have not filed cloture on this side. And we may have to yet this evening, but I hope we could have some indication that we will be permitted to vote tomorrow.

It was my understanding on Friday from a number of Members on the other side—Senator BIDEN, Senator METZENBAUM—that they saw no reason why there could not be a vote on Tuesday. I hope that is the case because we do have as I have indicated a mountain of work to do. We would hope tomorrow then, if we can, to have a vote on Rehnquist, and Scalia following. We will take up appropriations bills until well into the evening tomorrow night.

If there is not to be a vote on those nominees, then we I think are entitled to have that information so that we can plan on what we wish to do to try to expedite the business of the Senate.

I hope there would be more debate, that people are willing to speak on Rehnquist for or against nomination, and now would be an appropriate time to do that. It is only 25 until 6. We did not come in until 11 today, and were not on the nomination until about 12:30. We have had several quorum calls.

I understand we now have a speaker on the nomination. I thank the distinguished Senator from Rhode Island.

Mr. PELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

THE REHNQUIST NOMINATION: A LEGAL EXTREMIST SHOULD NOT LEAD THE SUPREME COURT

Mr. PELL. Mr. President, I appreciate the opportunity to speak on the nomination of Justice Rehnquist.

I must say that after careful consideration I have decided to oppose the nomination of William Rehnquist to serve as Chief Justice of the United States.

I oppose the nomination of Mr. Rehnquist with some reluctance, because I have always believed that a Presidential nominee should be confirmed, barring serious flaws of character or integrity or evidence of gross incompetence which would prevent the nominee from performing the duties of the office for which he or she has been nominated. In the case of Mr. Rehnquist, clearly none of these impairments apply. He is a man of great intellect and good moral character and clearly his record over the past 15 years on the Supreme Court demonstrates his technical competence for the position of Chief Justice.

But when a nominee is being considered for a term that will extend many years after the life of the administration that appointed him, as is uniquely the case with Federal court nominees, then I believe the Senate has a greater burden to discharge in the confirmation process. The question becomes not merely one of whether the justice-designate is a man or woman of intelligence and integrity, but whether the nominee is a person who is appropriate to make legal and social policy for the society that will be inhabitated by our children and our children's children.

The Supreme Court occupies a very singular position in our society. Nine unelected men and women, with lifetime tenure, are vested with the power to act, in effect, as a "superlegislature" in making legal and social policy that touches virtually every aspect of our lives. One need only look at Supreme Court decisions over the past 40 years in the areas of civil rights, voting rights, labor relations, sex discriminaton, and a host of other questions along the cutting edge of social change to realize the virtually infinite power of the Supreme Court to alter the fabric of our society.

The leadership and judicial philosophy of the next Chief Justice will long outlast the viewpoint of the current administration, which of course will expire on January 20, 1989. Chief Justice John Marshall was nominated by the lame duck administration of John Adams in 1801 and, over the next 34 years, left a lasting judicial legacy even though President Adams' political party, the Federalists, has long since ceased to exist. His successor, Roger B. Taney was appointed in the last year of the Jackson administration and served for 28 years. The combined tenure of these two men spanned the period from the infacy of the Republic until the closing days of the Civil War, a reach of well over three generations. In more modern times, the legacy of Chief Justice Earl Warren outlived the Eisenhower administration. From 1789 until the present, a period of roughly 200 years, only 15 persons have served as Chief Justice.

When a nominee is being considered for a term that will extend many years the life of the administration that appointed him, the confirmation process is far more important than in the case of a routine appointment. And when that nominee is also of an extreme viewpoint, whether liberal or conservative, then I believe the Senate should hesitate in confirming that appointment.

The record of Justice Rehnquist, both in the period before he joined the Supreme Court and more importantly over the past 15 years, demonstrates conclusively that his extreme legal philosophy is incompatible with the mainstream of our society today.

□ 1740

I have reviewed his record, and particularly in the areas of civil rights, women's rights and the relationship of government and the individual in modern society, Justice Rehnquist has demonstrated that his extremely narrow judicial philosophy is at odds with the view of society held by the board spectrum of American citizens. His interpretation of the Constitution is a narrow one, perhaps better suited to the more uncomplicated world of 1886 than the turbulent sometimes chaotic American society of 1986.

I would emphasize here that the current confirmation process is not a referendum on whether William Rehnquist should continue as a member of the Supreme Court. I fully expect Mr. Rehnquist to serve as an able member of the Court for many years to come, indeed into the next century, long after most Senators here have left this body. Moreover, I would point out that 15 years ago, I supported Mr. Rehnquist's confirmation when he was nominated to serve as an Associate Justice of the Supreme Court. My concerns about Mr. Rehnquist's extreme legal and constitutional views were not as great when he was selected to serve as an Associate Justice.

The issue before us, today, however, is whether Mr. Rehnquist should be promoted to the high position of Chief Justice. Other than the presidency, no public office in the American system of government is entrusted with greater responsibility than the Chief Justice. He is both the symbolic head of our judicial system and the top policymaker and administrator for the Federal courts. The responsibilities of the Chief Justice make him more than merely "first among equals" in his relationships to his colleagues on the Nation's highest court. This is especially so as we stand at the eve of the bicentennial of our Constitution. The task of the next Chief Justice is to adapt that great document to the society that will usher us into the 21st century, and who does not go beyond the bounds of mainstream constitutional philosophy. That man or woman must have a vision of an evolving society, an evolving Constitution, and I do not believe Justice Rehnquist possesses that.

Here I am reminded of Thomas Jefferson's admonition that institutions of government must evolve with the times:

> I am not an advocate for frequent changes in laws and Constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.

In conclusion, I would emphasize this point: when it comes to the Chief Justice, he, above all the Justices, must be within the limits of conventional political philosophy and not be on the extreme left or the extreme right. In this case, this would not be the case. If an individual Justice is outside the extremes, then it is no excuse for the Chief Justice.

Mr. MOYNIHAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. MOYNIHAN. Mr. President, I ask unanimous consent that I might be allowed to proceed as in morning business for 10 minutes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

NICHOLAS DANILOFF

Mr. MOYNIHAN. Mr. President, in the week since the Senate unanimously deplored the outrageous arrest of Nicholas Daniloff in Moscow, a correspondent for U.S. News & World Report, that situation has worsened and it would not, I think, be wrong to describe it as having escalated at the desire of the Soviet Union; escalated between our assertion of the fact and their denial; their acts of provocation that can only be seen as deliberate; and their decision to act in a manner without precedent in the history of the relations between the United States and the Soviet Union.

I think, Mr. President, that this is something to be emphasized.

In the past, when Soviet spies have been arrested in the United States, it

has been common for the Soviet Union to respond by arresting an American. But never before a journalist, and never before a journalist on the charge of espionage.

In the darkest hours of Stalin's murderous dictatorship, this never happened.

Precision requires me to state that, in 1949, the American journalist, Anna Louise Strong, was arrested by the KGB, though there has been a whole succession of names for that organization since it was established in 1918–19.

Anna Louise Strong was a fervent admirer of Mao Tse-tung and the Chinese program which developed into an internal division between the Marxist worlds. Stalin wanted her out of Moscow and arrested her.

That was an exception. That was an argument within the Marxist world.

The arrest of Nicholas Daniloff is a direct, unprecedented attack upon an American journalist. But something has been added. It has become an attack upon the integrity of the President of the United States.

Mr. President, I feel the Senate must take cognizance of this. The passing of the years is never altogether a pleasant thing, but it does mean a certain accumulation of memories.

I can remember very well when, in 1963—while I was a member of the Kennedy administration—American authorities arrested an Amtorg employee. Amtorg, of course, is the Soviet state trading organization.

In response, a very distinguished scholar at Yale University, Prof. Frederick Barghoorn, was arrested in Moscow.

The very idea that this person was engaged in any espionage or other illegal activity was offensive to President Kennedy, and offensive to the academic community in this country, just as the charge against Nicholas Daniloff is offensive.

President Kennedy wrote to General Secretary Khrushchev. This was in the approximate aftermath of the Cuban missile crisis and our relations were not the warmest by any means.

He wrote the General Secretary and said, "You have my assurance that Professor Barghoorn is in no way an agent of American intelligence and we would be much obliged if you would immediately allow him to leave."

Mr. Khrushchev felt he had no alternative. You cannot tell the President of the United States, "You are a liar." He did not. He must have had some thoughts, but in no time at all, Professor Barghoorn was out of prison and back in New Haven.

Mr. President, the exact sequence of events has occurred here with respect to Mr. Daniloff. Not many days after his arrest, as reported in the press of September 7, it was stated that Mr. Reagan had written Mr. Gorbachev on September 5 and given his personal assurance that Mr. Daniloff was not a spy. This term "personal assurance" was given to the press by an official of the administration who in no way wished it not to be known but, to the contrary, wanted it to be known. Obviously, there was a parallel with the earlier letter to Mr. Khruschev.

□ 1750

Then, Mr. President, I am sorry to say that the very day following receipt of the President's letter, which we may assume was immediately transmitted, the Soviets announced that Mr. Daniloff would be charged with espionage, a crime for which the penalty in the Soviet Union is death. That is a sufficient outrage in and of itself. But, Mr. President, it was accompanied by the decision in effect to reject the President's assurances. It is a statement by Mr. Gorbachev that he either believes the President of the United States to be lying, or else that Mr. Gorbachev does not care about the President's statement of the facts. Mr. Gorbachev means to proceed with the prosecution in any event.

May I draw attention, Mr. President, to one of the more glaring aspects of this event in Moscow? On Saturday, September 13, Mr. Gerasimov, a Foreign Ministry spokesman for the Soviet Union, escalated yet further the charges against Mr. Daniloff, stating that he had been in contact with the named Americans who are alleged to be involved with intelligence activities.

Mr. GOLDWATER assumed the Chair.

Mr. MOYNIHAN. Yesterday, on "This Week with David Brinkley," that seasoned and always agile journalist asked Mr. Gerasimov to appear. He did. He asked him to tell us what was going on in Moscow. He did.

He referred to the scene in the Lenin Hills where Mr. Daniloff was handed a package from a Soviet citizen, whereupon he was sized by police officials. The package was opened and found to contain secret documents of the Soviet State, for which reason it was necessary to indict Mr. Daniloff for espionage, held him in prison, interrogate him, and remand him to his own Embassy to await trial on a charge for which the penalty is death.

This went on for some moments, Mr. President. My distinguished and good friend in the chair very possibly witnessed this. Suddenly, in the most innocent possible way, Mr. Brinkley asked the Soviet spokesman, "And tell us, what has happened to the Soviet citizen who passed this secret information to Daniloff? Is he in prison?" Silence. Silence. "The matter is being investigated."

Now, Mr. President, could there be a more transparent assertion that this was a situation of entrapment? Are the Soviets much in the habit of arresting foreign agents who are involved with their own citizens who are, shall I say, legitimately involved in treason, and letting them just go off for their vacations or whatever? Obviously not. I am afraid that the poor man was used by the KGB may be in prison today as they could not very well have him walking about the streets. This is so clearly a case of entrapment.

But, Mr. President, beyond that, the solemn word of the President of the United States has been rejected. It raises for us in the Senate, and for the American people generally, the question of what can be our relationship with a Government which is so disdainful, is so contemptuous of our Government?

When the President of the United States sends a letter about a matter of this gravity, he speaks for the Nation. Consequently, I would hope that the President might make that letter public. There is a sense in which the only people who do not have it are the American people. The Soviets do—the letter was sent to Mr. Gorbachev. The fact of it being sent was made public, as it should have been. The essential contents were made public, as they should have been. But would it not be useful if the President or the Secretary of State were to send to the Congress a copy of that letter so we might see what it is Mr. Gorbachev has chosen to reject?

If he is prepared, in effect, to say the President of the United States has lied, are we prepared to send the man's nation subsidized wheat? Are we free to enter into agreements of any consequence? Can we trust their word if they are so disdainful and contemptuous of ours? I do not see that possibility.

It may be they did not at first understand the enormity of their act. But surely, they could not have failed to grasp it when the President personally intervened in a manner that had precedent.

When President Kennedy intervened, the American was released. Mr. Khrushchev said, "I take your word." And a President is in the position indeed to say, yes, he was one of our fellows, I wish you would let him go anyway. That is the game nations play; we do it all the time, as a matter of fact.

But with Mr. Daniloff, there was obviously no occasion to make such a statement. President Reagan did assert, through direct personal contact with the General Secretary of the Communist Party of the Soviet Union, that this man has been wrongfully imprisoned and charged. And I am sure he asked for his immediate release.

If that is not sufficient, if that does not matter to the Soviet Union, then

we have to contemplate what that means.

Let us ask, what now in these relations? If they cannot be based at some level on some elemental form of trust—not trust in terms of the large movements of nations, but trust adversaries have to have about some of the rules of engagement, as the distinguished Presiding Officer would use that term, we are heading for a very cold winter indeed, again to use a phrase of John F. Kennedy.

In that regard, Mr. President, the President will be in New York on Monday, September 22, addressing the General Assembly of the United Nations.

□ 1800

And whilst there, I hope he might take cognizance of a crisis in the finances of the institution: A crisis precipitated on this floor when we made the decision to reduce our payments to the United Nations, from the 25 percent which is our assessed amount to 20 percent, unless the General Assembly adopts a system of weighted voting based on budgetary contributions. Such a system would require a change in the U.N. Charter equivalent to a constitutional amendment. Such a change is not feasible given the voting system in the United Nations. The result is that we seem to be heading inexorably for a situation where we are in default.

I have said several times, Mr. President, that I would be happy to see the budget of the United Nations reduced. But I do not want to see our influence there reduced. They are two different things. The budget payment is meant to represent a nation's portion of the world gross product, and to say we are a less important country than we have been seems to me to serve no purpose of any kind. Still, we have done this. And either the State Department or the White House has informally let the press know that they will ask us to restore moneys or appropriate additional moneys to avoid this crisis, one which we were very severely concerned with when the Soviets refused to pay assessments for the operations in the Congo in the 1960's.

I would hope, Mr. President, that when Mr. Reagan does speak in New York on Monday, he might even say that if we have a problem with financing the United Nations, it is in no small measure derived from the fact that the Soviet Union is in gross violation of its responsibilities under the charter. The U.S.S.R. places intelligence agents in the Secretariat, directly violating section 2, article 100 of the charter. This is more than a violation. It is a grievance over which the United States and the American public might properly be outraged. The simple fact is that when the Soviet intelligence agents in the Secretariat get their U.N. checks, they quite literally turn them in to the Soviet mission and get instead their regular pay allowances from the U.S.S.R. as if they were working in the mission itself in an overseas post. It is insult enough that the Soviets violate the charter and that Mr. Zakharov is a U.N. employee, but it certainly adds injury to insult that we are required to pay part of his salary. It would do no harm for the President to make this point.

We are in our current situation with the Soviets because after the United States arrested Mr. Zakharov, who does not have diplomatic immunity, the Soviets arrested an American who did not have diplomatic immunity.

Well, why have we let them do this for 30 years? Why do we not say to them the charter means something to us; that we did not write it that way without a care as to whether it would be observed; that we will not have your spies in the Secretariat building?

It was during my tenure as Ambassador to the United Nations that Arkady Slevchenko, the Under Secretary General of Political Affairs and the highest ranking Soviet member of the Secretariat, decided he wished to defect to the United States. He came over. He stayed in place for some time. He described this Soviet spying and most explicitly gave us the names, ranks, and serial numbers of the KGB and GRU agents in the United Nations. When a responsible foreign civil servant knows that the man in the next office is a Soviet spy, just think of the burden placed on the elemental workings of that organization. It is an outrage. It is a violation of the charter. It should never have been allowed to begin with and it ought to be stopped.

Mr. President, I see the distinguished majority leader is on the floor. The Senator was very courteous to me in giving me time to make these remarks and I yield the floor.

Mr. President, I ask unanimous consent that two articles be entered into the RECORD, one from the New York Times of September 7, 1986, and one from the Washington Post of September 8, 1986.

The PRESIDING OFFICER. Without objection, the materials will be printed in the RECORD.

Mr. MOYNIHAN. Mr. President, I had asked unanimous consent to proceed as if in morning session, and I assume we return to executive session.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

[From the New York Times, Sept. 7, 1986]

REAGAN WRITES TO GORBACHEV ABOUT REPORTER

(By Bernard Gwertzman)

WASHINGTON, Sept. 6.—President Reagan has sent a message to Mikhail S. Gorbachev, urging the immediate release of an American reporter held in Moscow on suspicion of espionage, Administration officials said today.

Mr. Reagan, in his first direct involvement in the case of Nicholas S. Daniloff, correspondent of the magazine U.S. News & World Report said in the message that he will offer personal assurances Mr. Daniloff was not a spy, the officials said.

The President also told Mr. Gorbachev, according to the officials, that Soviet-American relations were too important to be affected by the Daniloff case.

MESSAGE DELIVERED ON FRIDAY

The message was reported to have been delivered Friday. It was part of a stepped-up American effort that included a public declaration by Secretary of State George P. Shultz on Friday to press for the release of Mr. Daniloff, who was arrested Aug. 30.

The K.G.B., the Soviet intelligence and internal security agency, has accused Mr. Daniloff of espionage and Moscow has rejected American demands for his release. White House and State Department officials said today that if Mr. Daniloff was not freed by Monday, they would begin taking decisions on retaliatory measures.

Mr. Reagan's unusual testimony to the effect that Mr. Daniloff was not a spy was similar to a statement by President John F. Kennedy in November 1963 to gain the release of a Yale professor, Frederick C. Barghoorn. Professor Barghoorn had been seized in Moscow in apparent retaliation for the arrest in New Jersey of a driver for the Soviet trade agency, Amtorg.

The existence of Mr. Reagan's letter in the Daniloff case was first disclosed by U.S. News and World Rerpot. The White House had no comment, but other officials confirmed the report.

A senior official said the K.G.B. seemed to hope that Mr. Daniloff could be traded for Gennadi F. Zakharov, a Soviet spy suspect held in New York.

Mr. Daniloff told his wife by telephone from prison today that interrogators had made "fuzzy" remarks about a possible exchange, but that in the meantime they were acting as if his case would go to trial and he would be convicted.

On Friday, Secretary of State Shultz said that the United States ruled out a trade and that Mr. Daniloff had concurred.

The United States contends the two cases are not equivalent. The Americans say that Mr. Daniloff was set up when an envelope handed him by a Soviet acquaintance turned out to contain secret materials, and Mr. Zakharov was caught as he was paying for secret documents.

The Americans have made a proposal to the Soviet Union for resolving the situation. Under the proposal, Mr. Daniloff would be freed and allowed to return to the United States, and the United States Attorney's office would then ask a judge to release Mr. Zakharov in the custody of the Soviet Ambasador, Yuri V. Dubinin, pending trial on espionage charges.

Mr. Dubinin's initial request that Mr. Zakharov be turned over to him was rejected during the arraignment hearing. Another hearing is set for Tuesday, by which time it may be clear whether the Daniloff case turns out to be "a tempest in a teapot or a big deal," a senior official said.

This message, he said, has been conveyed to the Russians in different ways in recent days. On Friday, for instance, during the opening of special arms control talks here, Paul H. Nitze, the American delegate, raised

the matter privately with Viktor P. Karpov, the Soviet delegate.

Mr. Shultz is scheduled to meet with Foreign Minister Edward A. Shevardnadze on Sept. 19 and 20 to discuss, in part, the setting of a date for a meeting between President Reagan and Mikhail S. Gorbachev, the Soviet leader.

"If Daniloff is still in prison by Sept. 19 it is going to be very hard for there to be a very constructive meeting, because Daniloff will have to head the agenda," a State Department official said. "And it blows my imagination to see the President sitting down with Gorbachev if the Daniloff case is still out there."

Officials said that a list of retaliatory moves was being discussed, but that it was difficult to identify steps that would be both damaging to the Soviet Union and not counterproductive to the United States.

CARTER'S SANCTIONS RECALLED

An official said that the Carter Administration, for instance, "shot itself in the foot" with some of the sanctions it imposed on the Soviet Union after its forces intervened in Afghanistan in December 1979.

One was the canceling of plans to open consulates in Kiev and New York. The Russians lost very little, the official said, because they already have a large presence in New York, but "we lost a city where there are hardly any Americans."

He said the possible withdrawal of an offer to sell the Russians four million tons of subsidized wheat would be of no significance because there was a glut on the world grain markets. Moreover, it would damage American farmers.

He said that the United States was looking at sanctions that would cause some "permanent disability" if the Daniloff case is not resolved.

"We have to be more resourceful than we have been in the past and come up with something genuinely punitive, and convince them that the seizing of Nick Daniloff was absolutely not the way to go in relations," the official said.

The Daniloff case has again aggravated differences within the Administration on how to deal with the Soviet Union.

Defense Secretary Caspar W. Weinberger considers the arrest of Mr. Daniloff so outrageous that he says the Soviet Union should be punished now, and not threatened with some future steps, an aide said.

Mr. Weinberger said on Friday that the Soviet action had endangered arms control talks, and the aide said Mr. Weinberger would not mind putting off future negotiations until the reporter was freed.

But Mr. Shultz was said by officials to believe that Soviet officials should be given time to extricate themselves from the situation in a way that allows them to save face. Thus, he argued that Moscow should be given at least until Monday.

Several officials acknowledged that the Administration's public position has been flawed. On two occasions, spokesmen at the California White House were the sources for articles suggesting that the United States was amenable to a deal, when the only arrangement was to consider turning over Mr. Zakharov to Soviet custody pending trial after Mr. Daniloff was safe in the United States.

[From the Washington Post, Sept. 8, 1986]

DANILOFF IS INDICTED AS SPY BY SOVIETS

(By Gary Lee)

Moscow, Sept. 7.—American journalist Nicholas Daniloff was indicted today on charges of espionage against the Soviet Union, in a move that both U.S. and Soviet officials said could pose a serious new obstacle to efforts to improve relations between the two superpowers.

Daniloff, the correspondent here for U.S. News & World Report, is the first American journalist to be formally charged by Soviet authorities with espionage.

There was no indication when Daniloff would be put on trial, and he told a colleague by telephone today that he understood the pretrial investigation could last six months or more. Without elaborating, however, he also said, "I received oblique hints that it will end before being brought to court."

The indictment was publicly announced tonight on the evening news on Soviet state television, after Daniloff had informed Jeff Trimble, the new U.S. News & World Report correspondent here, in a telephone call from Lefortovo Prison, where he has been held since being arrested.

Earlier, Soviet Foreign Ministry spokesman Gennady Gerasimov, appearing from Moscow on CBS-TV's "Face the Nation," had said that Daniloff was about to be charged and "there is going to be a trial."

Daniloff, who was about to end a 5½-year assignment here, was seized by KGB secret police agents Aug. 30 moments after he received an envelope from a longtime Soviet acquaintance. Daniloff said he had expected the envelope to contain newspaper clippings. But when the KGB opened it, Daniloff told Mortimer Zuckerman, chairman of U.S. News & World Report, who visited him in prison Tuesday, it turned out to hold photographs of military installations and negatives of maps.

Gerasimov, interviewed from here by CBS today, said, "If you think he is innocent, we can learn pretty soon because there is going to be a trial."

Gerasimov also charged that Daniloff "doesn't deny the things that he got in that unfortunate envelope were secret ones," and he said that "my understanding is that this particular envelope is not the only thing that they have against him." He would not give any details.

"Let us not make this case a hostage for Soviet-American relations," Gerasimov said, observing that "if you really want to ruin Soviet-American rapprochement, you can always find something happening here or there."

The formal announcement of the indictment and trial plans marked the beginning of a tougher official line here against Daniloff. The official Soviet Communist Party newspaper Pravda, breaking a weeklong silence on the case, attacked Daniloff and his American supporters, including Secretary of State George P. Shultz.

Western diplomats here interpret Moscow's threat of a trial and the hardened official line as a signal that the Kremlin is unlikely to accept any early resolution of the Daniloff case short of a direct swap of the American reporter for Gennadi Zakharov, the Soviet U.N. employee who was arrested on espionage charges in the United States and is being held for trial.

The Daniloff arrest came exactly one week after the FBI arrested Zakharov, moments after he paid a New York man for what U.S. officials said were classified documents.

"My case is moving into a more serious phase," Daniloff told Jeff Trimble's wife, Gretchen, who answered the telephone when he called his home from prison this afternoon. "The charge of espionage puts it on a par with another case we know," he said, in a clear reference to Zakharov, whose release the Soviets have demanded.

Daniloff had earlier rejected a swap, but his position appears to have softened after a week of KGB interrogation.

"The quickest solution would be if the two cases could be looked at on an equal basis," he said in today's call, according to Gretchen Trimble.

But he also told Jeff Trimble in the same call that he personally favored a solution in which the charges against him would be dropped and he would be cleared.

The Soviet Union has arrested a number of Americans on suspicion of spying in the past, but most have been diplomats who have been quickly expelled. Neither Daniloff nor Zakharov has diplomatic immunity.

Gretchen Trimble said Daniloff told her that authorities had informed him he now faces a possible six-month investigation period that could be extended by three months and would be followed by a trial before a Soviet military tribunal.

Hints of a possible swap have arisen, he said, "but I have the overwhelming sense that they are pursuing charges of espionage."

Today's announcements indicate that the original U.S. bid to gain Daniloff's freedom has been rejected in Moscow. Reagan administration officials proposed that Zakharov be released to the custody of the Soviet ambassador in Washington while awaiting trial. In exchange, Daniloff would go free, according to the proposal.

The formal charging also implies that President Reagan's appeal to Soviet leader Mikhail Gorbachev to free Daniloff, sent in a letter Friday and publicized yesterday, also was turned down.

Daniloff's arrest is widely presented in the West as a KGB setup related to the arrest of Zakharov. Reagan reportedly told Gorbachev in the letter that it could harm U.S.-Soviet relations.

An American Embassy spokesman called the Daniloff indictment "very bad news indeed," but declined to asess its immediate impact on U.S.-Soviet ties.

When asked whether Daniloff is the victim of a trumped-up charge, Gerasimov, in the U.S. televison interview, said, "He went to this particular meeting with somebody of his own will."

"He made this step and he must take the consequences," Gerasimov added.

In answer to a question, Gerasimov said he did not know whether Daniloff had paid for the material in the envelope.

In today's telephone call, Daniloff said he has reiterated to Soviet Officials that he is a journalist and not a spy. But he told Jeff Trimble, "what is looked at in the U.S. as normal journalistic activity is not seen that way here."

In a commentary on the Daniloff case, Pravda condemned the "ballyhoo" over it in the United States and in the western press, saying, "The incident has been turned into a forged pretext to stir up one more anti-Soviet campaign."

"On the Potomac," Pravda said, "they raise a frantic press hullabaloo." It said that State Department officials, including

Shultz, "do not shrink from including themselves in this farcical course."

"It is evident that the zealous supporters of the failed agent urgently need to distract the attention of the world public from the Soviet peace initiatives," Pravda said.

NOMINATION OF WILLIAM H. REHNQUIST, TO BE CHIEF JUSTICE OF THE UNITED STATES

The Senate continued with the consideration of the nomination.

The PRESIDING OFFICER. The distinguished majority leader.

Mr. DOLE. Mr. President, what is the pending business?

The PRESIDING OFFICER. The pending business is the Rehnquist nomination.

CLOTURE MOTION

Mr. DOLE. Mr. President, it had been my fervent hope, based on conversations I had last Friday with a number of my colleagues on both sides, we would be able to vote on the Rehnquist nomination on Tuesday. I have now been advised by the distinguished Senator from Massachusetts [Mr. KENNEDY] that he does not want to vote on Tuesday. I think that is unfortunate. But it leaves, as far as I can tell, very little recourse than to file a cloture motion because the clock is ticking and another day means it will probably make it that much more difficult to meet the October 3 adjournment date. I have had a discussion with the Senator from Massachusetts. I have asked him if cloture were filed, if we could move on, if we had the consent of the distinguished minority leader and other Members on both sides, to other business and time would not be wasted, because I do not believe there is that much more debate on the Rehnquist nomination. He did indicate he would be willing to permit us to move into appropriation bills and do other things, but he did not want to vote tomorrow and that is his right. I do not agree with him but that is his right. I mean I do not agree that we should not vote tomorrow. It seems to me this would hopefully bring this matter to a conclusion on Wednesday, although I am sure there could be a great deal of debate on Wednesday. So I am going to send a cloture motion to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislation clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

Bob Dole, Strom Thurmond, Thad Cochran, Chic Hecht, Dan Quayle, James A. McClure, William L. Armstrong, Jesse Helms, Phil Gramm, Mack Mattingly, Jeramiah Denton, Orrin G. Hatch, James Abdnor, Paul Trible, Malcolm Wallop, and Al Simpson.

□ 1810

Mr. DOLE. Mr. President, a parliamentary inquiry: When would the vote occur on this cloture motion? When would the cloture motion mature?

The PRESIDING OFFICER. On Wednesday.

Mr. DOLE. One hour after we convene?

The PRESIDING OFFICER. One hour after we convene.

Mr. DOLE. I will consult with the distinguished minority leader and see if we can work out a time to accommodate all our colleagues. This is a very important vote, and I think they want to be here.

Again, if we can do additional work tomorrow on a couple of appropriation bills, that will be helpful. I regret that some of our colleagues have made plans on the fervent hope that we would vote tomorrow. They may have to modify those plans. But this is it. There is no way we can force a vote tomorrow. We had hoped that by accommodating our colleagues, we would be permitted to vote tomorrow. That is not going to happen. I hope we can invoke cloture and that shortly after cloture is invoked, we can proceed to vote on the Rehnquist nomination.

I am advised that on the Scalia nomination, there probably will be a little debate, and we could dispose of that nomination in a matter of hours or less.

So I alert my colleagues that on tomorrow we hope to fill in the blanks, the time we have, with the Interior appropriation and the D.C. appropriation. As I understand it, there is one other, Transportation.

So, with some luck, we might be able to conclude action on those three appropriation bills tomorrow and still permit Senators who wish to speak on the Rehniquist nomination to do so.

LEGISLATIVE SESSION

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate resume the consideration of legislative business.

There being no objection, the Senate resumed the consideration of legislative business.

MESSAGES FROM THE PRESIDENT RECEIVED DURING ADJOURNMENT

Under the authority of the order of the Senate of January 3, 1985, the Secretary of the Senate on September 12, 1986, during the adjournment of the Senate, received messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received on September 12, 1986 are printed at the end of the Senate proceedings.)

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mrs. Emery, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

DRUG-FREE AMERICA ACT OF 1986—MESSAGE FROM THE PRESIDENT—PM 172

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with accompanying documents; which was referred to the Committee on the Judiciary:

To the Congress of the United States:

I am pleased to transmit today for your immediate consideration and enactment the "Drug-Free America Act of 1986." This proposal is one of the most important, and one of the most critically needed, pieces of legislation that my Administration has proposed. I strongly encourage the Congress to act upon this proposal before its adjournment.

Drugs are menacing our Nation. When Nancy and I spoke to the Nation last evening about what we Americans can do to win the fight against illegal drugs, we said that it is time to pull together. All Americans—in our schools, our jobs, our neighborhoods—must work together. No one level of government, no single institution, no lone group of citizens can eliminate the horror of drug abuse. In this national crusade, each of us is a critical soldier.

From the beginning of my Administration, I pledged to make the fight against drug abuse one of my highest priorities. We have taken strong steps to turn the tide against illegal drugs. To reduce the supply of drugs available in our country, we moved aggressively against the growers, producers, transporters, smugglers, and traffickers. Our spending for drug law enforcement has nearly tripled since 1981. To reduce demand, we plotted a course to encourage those who use drugs to stop and those who do not, never to begin. I am especially pleased

at the success that the military has experienced, reducing drug usage by over 67 percent among our Armed Forces. And as a direct result of Nancy's leadership and commitment, over 10,000 "Just Say No" clubs have been formed throughout the United States over the past few years to discourage drug use among our youth.

Today I am announcing a set of initiatives that will build upon what we have already accomplished. This set of initiatives, totaling almost $900 million in Fiscal Year 1987 in additional resources targeted to ridding our society of drugs, brings out total Federal contribution for fighting drugs to over $3 billion. Our initiatives are composed of several separate budget amendments; a six-title bill seeking stronger authority for our law enforcement personnel, both at home and abroad, increased penalties for taking part in the sale of illegal drugs, and establishing a new program to help our schools reach our youngsters before drugs reach them; and an Executive order setting the example for our Nation's workplaces by achieving a drug-free Federal work force.

Through separate budget amendments that I will soon transmit, I will request $100 million for State grants to enhance our capacity in this country to treat drug users. We must put a stop to the tragedy of a drug user who seeks help and cannot get urgently needed treatment. I will request $34 million for increased research into the most successful rehabilitation and treatment methods. Our expanded research will include a focus on better ways to intervene with high-risk children and adolescents. I will also request $69 million for grants to communities that show they can pull together to fight the scourge in their neighborhoods. Federal matching funds will be made available to help these communities to increase education, prevention, and rehabilitation efforts. Finally, I will submit a request for additional funds for other intervention, education, and prevention assistance from the Federal Government.

Our law enforcement and interdiction efforts must be increased as well. I will propose substantial increased funding—approximately $400 million in 1987—for a major new enforcement initiative along our southwest border. A similar initiative will be proposed for our southeast border, involving at least $100 million in added funds.

I will be proposing shortly appropriate budget amendments to ensure that these necessary funds are made available. At the same time, other activities will be scaled back in order not to add to the Federal deficit.

The legislation I transmit today, the "Drug-Free America Act of 1986," is the second component of the greatly increased anti-drug abuse effort to which I have pledged my Administration. This legislation is a six-titled measure that, when enacted, will be the cornerstone of our efforts.

Title I, the "Drug-Free Federal Workplace Act of 1986," enables the Federal government, as the Nation's largest employer, to set an example in ensuring a drug-free workplace. The enactment of this title will make clear that the use of illegal drugs by current or prospective Federal employees will not be tolerated.

Title II of the bill, the "Drug-Free Schools Act of 1986," authorizes a major new grant program—at $100 million in 1987—to assist State and local governments in establishing drug-free learning environments in elementary and secondary schools.

Title III, the "Substance Abuse Services Amendments of 1986," responds to the grave health threat that the use of illegal drugs presents. It extends, from Fiscal Year 1988 through Fiscal Year 1992, the block grant under which funds are made available to the States for alcohol and drug abuse and mental health programs, and eliminates several unnecessary restrictions contained in current law that limit the flexibility of the States in putting these funds to work where they are most needed.

Title IV, the "Drug Interdiction and International Cooperation Act of 1986," emphasizes the need for increased and better international cooperation in the fight against drugs. This important set of proposals improve the procedures used in seizing the proceeds of narcotics-related crimes committed in other countries, facilitates the participation of United States law enforcement personnel in drug enforcement operations abroad, and ensures that aliens in this country who are convicted of illegal drug offenses can be deported.

Title V, the "Anti-Drug Enforcement Act of 1986," contains several measures that make available the necessary tools to our law enforcement personnel and our courts to ensure that those convicted of illegal drug offenses are both suitably punished and deprived of the fruits of their unlawful labors. This title also substantially increases penalties for drug trafficking and establishes additional penalties for persons who take advantage of and employ juveniles in drug trafficking. This title provides the tools to go after the manufacturers of "designer drugs," and hits drug traffickers in their pocketbooks by cracking down hard on money laundering, a practice widely used to conceal the illegal origin of large amounts of cash.

Finally, title VI, the "Public Awareness and Private Sector Initiatives Act of 1986," encourages the increased cooperation between the private sector and the Government in educating the public about the hazards of drug abuse.

I applaud the Congress for grappling with the drug abuse problem on a timely basis, and I urge speedy consideration of these proposals. But I do not for a moment suggest that enactment of these legislative proposals will result, by itself, in the elimination of illegal drugs in America. This can only happen when all Americans join together in the fight against drugs. Prompt enactment by the Congress of this package of our legislative proposals is an essential step in our plan to eliminate drug abuse.

Today, I underscore my commitment to this effort by signing the third component of my administration's anti-drug initiative, an Executive order that supports the objectives contained in Title I of the proposed legislation. The Executive order puts in place the policy that the use of drugs by Federal employees, either on duty or off duty, will not be tolerated. I am directing the head of each Federal agency to develop a plan to achieve a drug-free workplace and authorizing drug testing for applicants for all Federal jobs and for employees in certain sensitive positions. I am directing that programs to counsel, treat, and rehabilitate employees found to be using illegal drugs be expanded.

Over the years, our country has never hesitated to defend itself against the attack of any enemy, however formidable and whatever the odds. In many ways, the enemy facing us now—illegal drugs—is as formidable as any we have ever encountered. As a result of the combined actions of all Americans we will achieve the goal we all seek—a drug-free America for ourselves and for our children.

RONALD REAGAN.

THE WHITE HOUSE, *September 15, 1986.*

MESSAGES FROM THE HOUSE

At 11:29 a.m., a message from the House of Representatives, delivered by Mr. Berry, one of its reading clerks, announced that the House agrees to the amendment of the Senate to the following bill:

H.R. 4868. An act to prohibit loans to, other investments in, and certain other activities with respect to, South Africa, and for other purposes.

The message also announced that the House disagrees to the amendment of the Senate to the bill (H.R. 4021) to extend and improve the Rehabilitation Act of 1973; it asks a conference with the Senate on the disagreeing votes of the two Houses thereon, and appoints Mr. HAWKINS, Mr. BIAGGI, Mr. WILLIAMS, Mr. MARTINEZ, Mr. HAYES, Mr. ECKART of Ohio, Mr. WALDON, Mr. JEFFORDS, Mr. GOODLING, Mr. COLEMAN of Missouri, and Mr. BARTLETT as managers of the conference on the part of the House.

The message further announced that the House disagrees to the amendment of the Senate to the bill (H.R. 4116) to extend and improve the Domestic Volunteer Service Act of 1973; it agrees to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and appoints the following as managers of the conference on the part of the House:

For consideration of all provisions of the House bill and of the Senate amendment and modifications committed to conference: Mr. HAWKINS, Mr. ECKART of Ohio, Mr. JEFFORDS, and Mr. COLEMAN of Missouri.

For consideration of all provisions of the House bill and of the Senate amendment (except sections 3, 4, 5, 7, and 8(a) of the House bill and sections 3, 6, and 9 of the Senate amendment) and modifications committed to conference: Mr. KILDEE, Mr. OWENS, Mr. PERKINS, Mr. BRUCE, Mr. PETRI, and Mr. TAUKE.

For consideration of all provisions of the House bill and of the Senate amendment (except sections 8(b), 8(c), 8(d), and 9 of the House bill, and sections 4, 5, and 10 of the Senate amendment) and modifications committed to conference: Mr. WILLIAMS, Mr. BIAGGI, Mr. MARTINEZ, Mr. HAYES, Mr. WALDON, Mr. GOODLING, and Mr. BARTLETT.

At 3:15 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 5484. An act to strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.

At 3:44 p.m., a message from the House of Representatives, delivered by Mr. Berry, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 5313. An act making appropriations for the Department of Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices for the fiscal year ending September 30, 1987, and for other purposes.

ENROLLED BILLS SIGNED

The message also announced that the Speaker has signed the following enrolled bills:

H.R. 3247. An act to amend the Native American Programs Act of 1974 to authorize appropriations for fiscal years 1987 through 1990;

H.R. 3443. An act to designate the Closed Basin Conveyance Channel of the Closed Basin Division, San Luis Valley Project, Colorado, as the "Franklin Eddy Canal"; and

H.R. 4868. An act to prohibit loans to, other investments in, and certain other activities with respect to, South Africa, and for other purposes.

The enrolled bills were subsequently signed by the President pro tempore [Mr. THURMOND].

MEASURES REFERRED

The following bill was read the first and second times by unanimous consent, and referred as indicated:

H.R. 5313. An act making appropriations for the Department of Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices for the fiscal year ending September 30, 1987, and for other purposes; to the Committee on Appropriations.

MEASURES PLACED ON THE CALENDAR

The following bills were read the second time and placed on the calendar:

S. 2798. A bill to establish and implement a comprehensive policy to combat drug abuse in the United States; and

S. 2814. A bill to preserve the authority of the Supreme Court Police to provide protective services for Justices and Court personnel.

The Committee on Environment and Public Works was discharged from the further consideration of the following bill, which was placed on the calendar:

S. 1903. An act to improve the safe operation of commercial motor vehicles, and for other purposes.

MEASURES READ THE FIRST TIME

The following bill was read the first time:

H.R. 5484. An act to strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.

ENROLLED BILL PRESENTED

The Secretary of the Senate reported that on September 12, 1986, she had presented to the President of the United States the following enrolled bill:

S. 2462. A bill to provide for the awarding of a special gold medal to Aaron Copland.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. HATFIELD, from the Committee on Appropriations, with amendments:

H.R. 5162. A bill making appropriations for energy and water development for the fiscal year ending September 30, 1987, and for other purposes (Rept. No. 99-441).

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. BAUCUS:

S. 2819. A bill for the relief of Jon Engen; to the Committee on the Judiciary.

By Mr. BIDEN (for himself and Mr. ROTH):

S. 2820. A bill to consolidate and improve Federal laws providing compensation and establishing liability for oil spills; to the Committee on Environment and Public Works.

By Mr. CHILES:

S. 2821. A bill to direct the Secretary of Agriculture to release a reversionary interest of the United States in certain land located in Putnam County, Florida, and to direct the Secretary of the Interior to convey certain mineral interests of the United States in such land to the State of Florida; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. BUMPERS (for himself, Mr. MATHIAS, Mr. STENNIS, Mr. THURMOND, Mr. INOUYE, Mr. DOLE, Mr. CRANSTON, Mr. WEICKER, Mr. HOLLINGS, Mr. COCHRAN, Mr. ZORINSKY, Mr. DECONCINI, Mr. MOYNIHAN, Mr. LEVIN, Mr. NUNN, Mr. BRADLEY, Mr. PRYOR, Mr. SIMON, Mr. KERRY and Mr. GORE):

S.J. Res. 413. Joint resolution to designate the month of October 1986 as "Learning Disabilities Awareness Month"; to the Committee on the Judiciary.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. BIDEN (for himself and Mr. ROTH):

S. 2820. A bill to consolidate and improve Federal laws providing compensation and establishing liability for oil spills; to the Committee on Environment and Public Works.

OIL POLLUTION CLEANUP ACT

Mr. BIDEN. Mr. President, today I am joined by my colleague from Delaware in introducing legislation to establish a unified Federal liability and compensation program for oil spills. This bill is nearly identical to that introduced by Senator MITCHELL and others on September 9.

For over a decade, Congress has debated the establishment of a comprehensive and unified Federal oil spill program. It is now time for the Senate to act on this legislation, and go on to settling our differences with the other body, differences which should be relatively easy to reconcile.

Over 10 years ago, I introduced a comprehensive oil spill compensation and liability package. Since that time, we have debated the issue time and

time again, and failed to put into law a program that is clearly needed.

While Congress has floundered on enacting appropriate legislation, proof of the need for a new program has mounted. At the time of my earlier bill, the wreck of the *Torrey Canyon* in 1967 provided the best evidence of the need for an effective oil pollution compensation system. The 1978 wreck of the *Amoco Cadiz*, which resulted in an infamous spill off the coast of France, showed how extensive the damage from an oil spill could be.

Closer to my State of Delaware, just about 1 year ago, the Panamanian-flagged *Grand Eagle* spilled over 435,000 gallons of oil into the Delaware River. The spill threatened several coastal areas of the State, including some fragile wetlands and wildlife refuges. Soon after the *Grand Eagle* spill, an additional 180,000 gallons of oil leaked into the river from a second oil tanker.

On Wednesday, September 10, another large oil spill occurred on the Delaware River. The *Viking Osprey* was hauling a load of 550,000 gallons of crude oil to a refinery outside of Philadelphia when it ran aground. The ship worked itself off the mud, but this was the apparent cause of a large release of oil. Early reports indicate that the crew did not even realize the ship had a problem. The Coast Guard estimates that over 300,000 gallons of oil were on the river.

The impact of a spill of this size can be quite serious and wide-ranging. Depending on its location, water supplies can be threatened and marshlands severely damaged. Even industry has to take special precautions to prevent oil-laden water from damaging its equipment and machinery.

Under existing law, the ship has roughly $6.3 million in liability coverage. This may be enough in this particular case because the cleanup operation has so far been able to contain most of the release. The fact that the ship is moored to a pier has helped the cleanup operation. However, if the proposals before the Senate, including the one I am introducing today, were law, coverage would range between $17 million and $20 million, and include payment for economic damages. Residents of my State and others should not have to continue to risk inadequate coverage for damages they may suffer from an oil spill, particularly when a solution is at hand.

We have been averaging about two major oil spills a year on the Delaware River. These are the major ones. Dozens of smaller ones take place every year. The point is that we can try to go to the root of the matter to prevent spills from occurring in the first place, but this is not going to completely eliminate them no matter how well-intentioned our efforts. Clearly, a simple and comprehensive program is needed to remedy the failures of shipping safety standards and practices and to mitigate the environmental and economic damages caused by an oil spill, no matter what its cause.

Time is the critical factor at this point of the session. The Senate Environment Committee is making progress toward reporting a bill. My goal in introducing this legislation, which does not vary greatly from the bill before the Environment Committee, is to make sure that oil spill legislation does not, once again, fall by the wayside as the end of the session approaches.

I believe the Environment Committee is well on its way to reporting a good bill. However, after 10 years of delay on this issue, I am aware that unforeseen obstacles could arise to slow its progress. My bill will provide the Senate with an alternative to achieve the goal of enactment of oil spill liability and compensation legislation this year. Should the committee bill become stalled, I am prepared to offer this bill as an amendment to other legislation.

Mr. President, we have no new issues to consider in the oil spill liability debate. It is time to put an end to the years of nonaction on this idea. We should not let this new opportunity to enact oil spill legislation pass us by.

By Mr. BUMPERS (for himself, Mr. MATHIAS, Mr. STENNIS, Mr. THURMOND, Mr. INOUYE, Mr. DOLE, Mr. CRANSTON, Mr. WEICKER, Mr. HOLLINGS, Mr. COCHRAN, Mr. ZORINSKY, Mr. DECONCINI, Mr. MOYNIHAN, Mr. LEVIN, Mr. NUNN, Mr. BRADLEY, Mr. PRYOR, Mr. SIMON, Mr. KERRY, and Mr. GORE):

S.J. Res. 413. Joint resolution to designate the month of October 1986 as "Learning Disabilities Awareness Month"; to the Committee on the Judiciary.

LEARNING DISABILITIES AWARENESS MONTH

Mr. BUMPERS. Mr. President, I rise today to introduce along with my distinguished colleague from Maryland, Senator MATHIAS and others, a joint resolution to designate October 1986 "Learning Disabilities Awareness Month." Last year, along with Representatives KEMP and BROWN in the House, Senator MATHIAS and I sponsored a similar joint resolution for October 1985, which was signed into law as Public Law 99-115. I strongly believe that the problem of learning disabilities needs the attention that such a commemorative month provides. In this light, Congress should once again work to focus attention on dealing with and understanding handicaps.

There are some 10 million children in the United States diagnosed as learning disabled. There are many more who may be suffering from these difficulties, without being so diagnosed. We simply want the families of the learning disabled to know that we care, and that we are willing to devote the attention of this country to their plight.

Great strides have been made in this country since the enactment of the Education for all Handicapped Children Act of 1975 (Public Law 94-142). The programs spawned by this legislation have brightened the lives of many children and engendered the hope that their difficulty can be overcome. These programs have enabled them to pursue their goals to the fullest potential. Under the auspices of Public Law 94-142, over 1.8 million learning disabled children have been served. Today, there are also hundreds of national and local support groups that help these children, their families, and the public to become more informed about the problems facing the learning disabled.

The term "learning disabled" did not emerge until the 1960's, but the problem had been studied extensively since the early 1800's. Because of the many misconceptions and controversies surrounding the study of the learning disabled, and in order to provide a framework for funding, legislation, and program development, Congress adopted legislation in 1968 that defined the term "learning disability." In sum, learning disabilities are neurological problems that can impair a child's ability to perform certain tasks that require accurate perceptive skills. These are physiological problems that in no way reflect a child's intellectual capacity or potential.

The learning disabled child may encounter difficulty in speech, reading, writing, math, concentration, and memory. Regulations that accompany Public Law 94-142 state that learning disabilities include "such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental asphasia."

The learning disabled child is often mistaken as being mentally retarded or emotionally disturbed. This is one of the many misconceptions that a concerted focus on the problem can dispel. The hyperactivity and antisocial behavior often associated with learning disabilities are simply a reflection of the frustration that these children feel. The frustrations often result in a sense of failure that breeds even further failure and low self-esteem.

These feelings can also lead to delinquency problems in some children. As much as 36 percent of the children in the juvenile justice system have been diagnosed as suffering from a form of learning disabilities. But there is hope. Evidence indicates that after 40 to 60 hours of remediation the rate of re-

cidivism by learning disabled delinquents drops drastically.

Learning disabilities are not just a problem for children. Studies by the Presidential Initiative on Adult Literacy show that 60 million men and women in this country cannot read the front page of their newspaper. A countless number of adults cannot complete a job application because of the inability to read it. The link between adult illiteracy and learning disabilities has been firmly established. Can we afford to allow the learning disabled child of today to become the illiterate adult of tomorrow?

Intelligent, gifted, and determined children can compensate for their handicaps. With early diagnosis and proper remediation, these children can develop strengths and reach goals that may never have been possible. If we can get a handle on what learning disabilities are, how to diagnose them, and we can start down the road to their treatment. The grassroots programs of awareness that will be highlighted by this resolution will be important steps toward solving the mystery of learning disabilities.

In conclusion, I wish to thank my colleagues who support and cosponsor this effort. Also, I wish to note my deep respect for the many caring organizations, such as the Arkansas Coalition for the Handicapped, the Arkansas Council of Learning Disabilities, and the Foundation for Children with Learning Disabilities, who labor selflessly on behalf of the many learning disabled children and adults in our country. With this resolution we want to supplement their efforts and their dedication, and to provide them the national recognition their work deserves.

Further, with the designation of October 1986 as "Learning Disabilities Awareness Month" we can heighten the awareness achieved during last year's commemorative month. We can further work to bring down the barriers that prevent the recognition and treatment of these problems. We can help these children lead happier and more fulfilled lives. Mr. President, I urge the Senate to adopt this joint resolution.

I ask unanimous consent to print the joint resolution in the RECORD.

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

S.J. RES. 413

Whereas millions of Americans suffer from one or more learning disabilities;

Whereas it is estimated that ten million American children have been diagnosed as suffering from learning disabilities;

Whereas most learning-disabled persons are of normal or above normal intelligence but cannot learn to read and write in the conventional manner;

Whereas it is important for parents, educators, physicians, and learning-disabled persons to be aware of the nature of learning disabilities and the resources available to help learning disabled persons;

Whereas early disagnosis and treatment of learning-disabled children give such children a better chance for a happy and productive adult life;

Whereas the courage necessary for learning-disabled persons to meet their special challenges should be recognized;

Whereas hundreds of national and local support groups for learning-disabled persons, parents of learning-disabled children, and professionals who work with learning-disabled persons have made important contributions to the treatment of learning disabilities;

Whereas research and study have contributed to public knowledge about learning disabilities, but much remains to be learned; and

Whereas public awareness of and concern about learning disabilities may encourage the establishment of the programs necessary to promote early diagnosis and treatment of learning disabilities and to help learning-disabled persons and their families cope with their learning disabilities: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That October 1986 hereby is designated "Learning Disabilities Awareness Month", and the President of the United States is authorized and requested to issue a proclamation calling upon all public officials and the people of the United States to observe such month with appropriate programs, ceremonies, and activities.

Mr. MATHIAS. Mr. President, today I join Senator BUMPERS to introduce a joint resolution to designate October 1986 as Learning Disabilities Awareness Month.

Millions of Americans have one or more learning disabilities, and an estimated 10 million American children have been diagnosed as learning-disabled. These statistics become all the more compelling when we look at the human side of learning disabilities.

Most learning-disabled people are normal or above normal in intelligence but have a neurological impairment which makes certain types of learning difficult. When a learning disability goes undiagnosed, individuals can experience years of frustration, confusion, and low self-esteem. Ignorant of the physiological basis for their difficulties in school, learning-disabled children risk a growing sense of isolation and failure.

Happily, researchers have been developing methods of diagnosing and treating learning disabilities. The most important factor is early identification of the disability. With early diagnosis and treatment, a learning-disabled child has a better chance of leading a productive and fulfilling adult life.

Yet even with the more sophisticated methods of detection available to us today, learning disabilities are still difficult to identify. That is why it is all the more important to increase the public's awareness of learning disabilities. The joint resolution that we introduce today will help set the stage for promoting awareness and educating the public about the nature of learning disabilities. Last year, organizations and individuals throughout the Nation participated in events held in honor of Learning Disabilities Awareness Month. It is our hope that this year's efforts will prove no less successful.

I am proud of the fact that Mrs. Mathias has demonstrated what an important difference one person can make. She has worked in schools and colleges and administrative offices to gain recognition and help for the learning-disabled. Most importantly, she has shared the story of her own struggle to surmount this problem and is an example which should give courage and inspiration to others who follow in her path. This joint resolution celebrates achievements such as hers and invites us all to share it.

ADDITIONAL COSPONSORS

S. 436

At the request of Mr. HATCH, the name of the Senator from Nevada [Mr. HECHT] was added as a cosponsor of S. 436, a bill to amend section 1979 of the Revised Statutes (42 U.S.C. 1983), relating to civil actions for the deprivation of rights, to limit the applicability of that statute to laws relating to equal rights, and to provide a special defense to the liability of political subdivisions of States.

S. 1793

At the request of Mr. KENNEDY, the name of the Senator from Arizona [Mr. DECONCINI] was added as a cosponsor of S. 1793, a bill to amend the Public Health Service Act to establish a grant program to develop improved systems of caring for medical technology dependent children in the home, and for other purposes.

S. 2093

At the request of Mr. ARMSTRONG, the name of the Senator from South Dakota [Mr. ABDNOR] was added as a cosponsor of S. 2093, a bill to recognize the organization known as The National Mining Hall of Fame and Museum.

S. 2454

At the request of Mr. MURKOWSKI, the names of the Senator from Michigan [Mr. RIEGLE] and the Senator from Rhode Island [Mr. PELL] were added as cosponsors of S. 2454, a bill to repeal section 1631 of the Department of Defense Authorization Act, 1985, relating to the liability of Government contractors for injuries or losses of property arising out of certain atomic weapons testing programs, and for other purposes.

S. 2455

At the request of Mr. MITCHELL, the name of the Senator from Iowa [Mr. GRASSLEY] was added as a cosponsor of

S. 2455, a bill entitled the National Organ and Tissue Donor Act.

S. 2699

At the request of Mr. SPECTER, the name of the Senator from Pennsylvania [Mr. HEINZ] was added as a cosponsor of S. 2699, a bill to amend the Controlled Substances Act to provide mandatory minimum sentences for distribution of controlled substances to minors, to add enhanced penalties, including mandatory minimum sentences, for employment of minors in the distribution of controlled substances, and to allow States receiving forfeited assets to use such assets for youth drug abuse prevention and rehabilitation.

S. 2731

At the request of Mr. BIDEN, the name of the Senator from Arkansas [Mr. PRYOR] was added as a cosponsor of S. 2731, a bill to provide the opportunity for farmers in areas affected by natural disasters to defer the payment of principal and interest due on Farmers Home Administration loans.

S. 2737

At the request of Mr. ABDNOR, the name of the Senator from Wyoming [Mr. SIMPSON] was added as a cosponsor of S. 2737, a bill to amend the Commodity Exchange Act to remove the application of such act to the trading of cattle.

S. 2744

At the request of Mr. HOLLINGS, the name of the Senator from South Carolina [Mr. THURMOND] was added as a cosponsor of S. 2744, a bill to require the issuance of import licenses for certain imports.

S. 2781

At the request of Mr. EVANS, the names of the Senator from Ohio [Mr. GLENN], the Senator from Florida [Mrs. HAWKINS], and the Senator from North Dakota [Mr. BURDICK] were added as cosponsors of S. 2781, a bill to amend the Energy Policy and Conservation Act with respect to energy conservation standards for appliances.

S. 2799

At the request of Mr. MITCHELL, the name of the Senator from North Dakota [Mr. BURDICK] was added as a cosponsor of S. 2799, a bill to consolidate and improve Federal laws providing compensation and establishing liability for oil spills.

S. 2802

At the request of Mr. TRIBLE, the names of the Senator from South Dakota [Mr. ABDNOR], and the Senator from Oklahoma [Mr. NICKLES] were added as cosponsors of S. 2802, a bill to prohibit foreign assistance to countries which fail to take steps to prevent and punish the laundering of drug-related profits in their territory, and for other purposes.

SENATE JOINT RESOLUTION 385

At the request of Mr. RIEGLE, the names of the Senator from Pennsylvania [Mr. HEINZ], the Senator from Maine [Mr. MITCHELL], the Senator from Indiana [Mr. LUGAR], the Senator from Illinois [Mr. SIMON], and the Senator from Minnesota [Mr. BOSCHWITZ] were added as cosponsors of Senate Joint Resolution 385, a joint resolution to designate October 23, 1986 as "National Hungarian Freedom Fighters Day."

SENATE JOINT RESOLUTION 401

At the request of Mr. GORE, the name of the Senator from Arkansas [Mr. PRYOR] was added as a cosponsor of Senate Joint Resolution 401, a joint resolution to designate the week of October 12, 1986, through October 18, 1986, as National Job Skills Week."

SENATE JOINT RESOLUTION 407

At the request of Mr. CHILES, the names of the Senator from Arkansas [Mr. PRYOR], the Senator from Tennessee [Mr. GORE], and the Senator from Nebraska [Mr. ZORINSKY] were added as cosponsors of Senate Joint Resolution 407, a joint resolution designating November 12, 1986, as "Salute to School Volunteers Day."

SENATE JOINT RESOLUTION 408

At the request of Mr. DOLE, the names of the Senator from Pennsylvania [Mr. SPECTER], and the Senator from Nebraska [Mr. ZORINSKY] were added as cosponsors of Senate Joint Resolution 408, a joint resolution designating "American Physiologists Week."

SENATE JOINT RESOLUTION 410

At the request of Mr. WILSON, the names of the Senator from New Jersey [Mr. BRADLEY], the Senator from Nevada [Mr. LAXALT], the Senator from Oklahoma [Mr. NICKLES], the Senator from Nebraska [Mr. ZORINSKY], the Senator from Georgia [Mr. NUNN], the Senator from Florida [Mrs. HAWKINS], the Senator from Idaho [Mr. MCCLURE], the Senator from South Carolina [Mr. THURMOND], the Senator from Kansas [Mr. DOLE], and the Senator from South Carolina [Mr. HOLLINGS] were added as cosponsors of Senate Joint Resolution 410, a joint resolution to designate the period commencing February 9, 1987, and ending February 15, 1987, as "National Burn Awareness Week."

AMENDMENTS SUBMITTED

DEPARTMENTS OF COMMERCE, JUSTICE, STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS, FISCAL YEAR 1987

HELMS AMENDMENTS NOS. 2804 THROUGH 2820

(Ordered to lie on the table.)

Mr. HELMS submitted 17 amendments intended to be proposed by him to the bill (H.R. 5161) making appropriations for the Departments of Commerce, Justice, State, the Judiciary, and related agencies for the fiscal year ending September 30, 1987, and for other purposes; as follows:

AMENDMENT No. 2804

On page 64, line 23, before the period insert the following: ": *Provided further*, That none of the funds appropriated for the Legal Service Corporation shall be used to support a recipient or grantee that does not—

"(1) submit an annual report to the Legal Services Corporation which complies with the accounting and reporting guidelines contained in Statement of Position (78-10), 'Accounting Principles and Reporting Practices for Certain Nonprofit Organizations', issued by the Accounting Standards Subcommittee on Nonprofit Organizations of the American Institute of Certified Public Accountants (AICPA) and dated December 31, 1978; and

"(2) institute a system of timekeeping consistent with the Legal Services Corporation's requirements as established by a majority of the Board of Directors of the Corporation. The annual report shall detail the number and types of cases handled, and the amount and types of legal training and legal technical assistance provided by the recipient. No information contained in the report shall identify or enable the identification of any person served by the recipient or in any way breach client confidentiality under applicable State law. With respect to a recipient's legislative activities, the report shall also document all direct and indirect expenses; the sources of all supporting funds, regardless of the sources of the funds employed; and all employee time. The system of timekeeping shall, at a minimum, provide, for any work done or service performed by a paralegal or an attorney the following information:

"(A) the date work is performed or service is provided;

"(B) the name of the attorney or paralegal performing the work or providing the service; and

"(C) a file number or other means of identifying the matter or case on which the work is performed or the client to whom service is provided. Recipients and grantees shall require all employees who are registered lobbyists or who devote any of their time to legislative activities, except for adjudicatory proceedings, to maintain time logs accounting for all working hours".

AMENDMENT No. 2805

On page 64, line 23, before the period insert the following: ": *Provided further*, That none of the funds appropriated for the Legal Services Corporation shall be used to initiate or support the formation of, act as an organizer of, or advocate that anyone join, any association, federation, labor union, coalition, network, alliance, or any similar entity".

AMENDMENT No. 2806

On page 64, line 23, before the period insert the following: ": *Provided further*, That none of the funds appropriated for the Legal Services Corporation shall be used to prepare, produce, or disseminate any com-

munication that provides directions on how to lobby".

AMENDMENT No. 2807

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to pay any dues to any organization, other than a bar association, a purpose or function of which is to engage in such political or legislative activities. For purposes of this proviso, the term—

" 'legislative activities' means lobbying and other activities designed to facilitate lobbying, including, but not limited to, attendance at legislative sessions or committee hearings, or the gathering of information or the analysis of pending legislation; and

" 'political activities' means those activities intended either to influence the electoral process or the making, as distinguished from the administration of, public policy, including favoring or opposing current or proposed public policy and also includes lobbying".

AMENDMENT No. 2808

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to maintain separate offices for the sole purpose of engaging in legislative or political activities. For purposes of this proviso, the term—

" 'legislative activities' means lobbying and other activities designed to facilitate lobbying, including, but not limited to, attendance at legislative sessions or committee hearings, or the gathering of information or the analysis of pending legislation; and

" 'political activities' means those activities intended either to influence the electoral process or the making, as distinguished form the administration of, public policy, including favoring or opposing current or proposed public policy and also includes lobbying".

AMENDMENT No. 2809

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used knowingly to assist others to engage in political or legislative activities. For purposes of this proviso, the term—

" 'legislative activities' means lobbying and other activities designed to facilitate lobbying, including, but not limited to, attendance at legislative sessions or committee hearings, or the gathering of information or the analysis of pending legislation; and

" 'political activities' means those activities intended either to influence the electoral process or the making, as distinguished form the administration of, public policy, including favoring or opposing current or proposed public policy and also includes lobbying".

AMENDMENT No. 2810

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to attend meetings of coalitions, networks, alliances, or any other groups formed to engage in political or legislative activities. For purposes of this proviso, the term—

" 'legislative activities' means lobbying and other activities designed to facilitate lobbying, including, but not limited to, attendance at legislative sessions or committee hearings, or the gathering of information or the anaylsis of pending legislation; and

" 'political activities' means those activities intended either to influence the electoral process or the making, as distinguished from the administration of, public policy, including favoring or opposing current or proposed public policy and also includes lobbying".

AMENDMENT No. 2811

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used by other groups to pay, in whole or in part, for the conduct of, or transportation to, an event if a primary purpose of the event is to facilitate political or legislative activites or any activity which would be prohibited if conducted with funds made available by the Legal Services Corporation".

AMENDMENT No. 2812

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to pay, arrange, or provide transportation to legislative or administrative proceedings persons other than employees of recipients, witnesses entering appearances in proceedings on behalf of clients, and clients".

AMENDMENT No. 2813

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to prepare, produce, or disseminate any article, newsletter, or other publication or written matter or other form of mass communication which contains any reference to proposed or pending legislation if—

"(1) the communication contains a direct suggestion, or, when taken as a whole, an indirect suggestion to the public at large or to persons outside of the recipient program (other than a client or group of clients currently represented by a recipient with regard to a matter directly related to the legislation, or their counsel or co-counsel) to contact public officials in support of or in opposition to legislation, or to contribute to or participate in any demonstration, march, rally, fundraising drive, lobbying campaign, letter writing, or telephone campaign for the purpose of influencing the course of such legislation; or

"(2) the publication contains directions on how to lobby generally or on particular legislation".

AMENDMENT No. 2814

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to solicit a client for the purpose of making legislative or administrative representation possible".

AMENDMENT No. 2815

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to support grassroots lobbying".

AMENDMENT No. 2816

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used, directly or indirectly, to solicit or arrange a request from any official to testify or otherwise make representations in connection with legislation".

AMENDMENT No. 2817

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to support a recipient that expends non-Federal funds or funds received from a source other than the Corporation for purposes prohibited by the Legal Services Corporation Act or this Act".

AMENDMENT No. 2818

On page 64, line 23, before the period insert the following: ": *Provided further,* That none of the funds appropriated for the Legal Services Corporation shall be used to pay for administrative or related costs, including transportation costs, associated with any activity prohibited by the Legal Services Corporation Act or this Act".

AMENDMENT No. 2819

At an appropriate place in the bill, add the following:

"SEC. . None of the funds appropriated or otherwise made available by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education as a result of being mentally or physically handicapped.".

AMENDMENT No. 2820

At an appropriate place in the bill, add the following:

"SEC. . Section 223(b) of the Communications Act of 1934 is amended—

(1) in paragraph (1)(A), by striking out 'under eighteen years of age or to any other person without that person's consent';

(2) by striking out paragraph (2);

(3) in paragraph (4), by striking out 'paragraphs (1) and (3)' and inserting in lieu thereof 'paragraphs (1) and (2)'; and

(4) by redesignating paragraphs (3), (4), and (5) as paragraphs (2), (3), and (4), respectively.".

NATIONAL AIR AND SPACE MUSEUM

GARN (AND GLENN) AMENDMENT NO. 2821

Mr. DOLE (for Mr. GARN, for himself and Mr. GLENN) submitted an amendment to the bill (S. 1311) to authorize the Smithsonian Institution to plan, design, and construct facilities for the National Air and Space Museum; as follows:

At the end of the bill, add the following:

SEC. . (a) The Congress finds that—

(1) the crew of the space shuttle Challenger was dedicated to stimulating the interest

of American children in space flight and science generally;

(2) the members of the crew gave their lives trying to benefit the education of American children;

(3) a fitting tribute to that effort and to the sacrifice of the Challenger crew and their families is needed; and

(4) an appropriate form for such tribute would be to expand educational opportunities in science by the creation of a center that will offer children and teachers activities and information derived from American space research.

(b) It is the sense of the Congress that—

(1) a Children's Challenger Center for Space Science should be established in conjunction with the Smithsonian Institution as a living memorial to the seven Challenger astronauts who died serving their country and to other individuals who gave their lives in exploration of the space frontier; and

(2) the Federal Government should, along with the Smithsonian Institution, public and private organizations, and persons, cooperate in the establishing of such a Center.

NOTICES OF HEARINGS

SELECT COMMITTEE ON INDIAN AFFAIRS

Mr. ANDREWS. Mr. President, I would like to announce that the Select Committee on Indian Affairs has scheduled a business meeting for Wednesday, September 17, 1986, at 2 p.m., in room S205 of the Capitol, to mark up the following bills:

H.R. 1920, to establish Federal standards and regulations for the conduct of gaming activities on Indian reservations and lands;

S. 2676, to provide for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians in San Diego County, California, and for other purposes;

S. 1452, to settle Indian land claims in the town of Gay Head, Massachusetts, and for other purposes;

S. 2564, to provide for the proper administration of justice within the Salt River Pima-Maricopa Indian Reservation by granting jurisdiction to the Salt River Pima-Maricopa Indian Community Court over certain criminal misdemeanor offenses;

S. 2107, to provide for the settlement of certain claims of the Papago Tribe of Arizona arising from the construction of Tat Momolikot Dam, and for other purposes;

S. 2504, to authorize certain transfers affecting the Pueblo of Santa Ana in New Mexico, and for other purposes.

Mr. President, I would like to announce that the Select Committee on Indian Affairs has set an oversight hearing on the Indian Trust Fund, the transmittal and investment of the money in the fund and the proposed request for proposal issued by the Treasury Department pertaining to the Indian Trust Fund. The hearing will be held in room 385 in the Russell Building on the 23d of September, 1986, from 10 a.m. until 12 noon.

AUTHORITY FOR COMMITTEES TO MEET

SUBCOMMITTEE ON MILITARY CONSTRUCTION

Mr. THURMOND. Mr. President, I ask unanimous consent that the Subcommittee on Military Construction, of the Committee on Armed Services, be authorized to meet during the session of the Senate on Monday, September 15, 1986, in order to mark up H.R. 1202, dealing with Fish and Wildlife on Military Reservations.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

COUNTERING SOVIET PROPAGANDA

● Mr. GRASSLEY. Mr. President, virtually since the day America embarked on a program to rebuild its defenses, which had been irresponsibly neglected during the 1970's, the Soviet Union has engaged in a major peace offensive in the hope of derailing America's defense modernization program. The main themes of the Soviet peace offensive are the peace-loving nature of the Soviet Union, the threat to peace posed by weapons of mass destruction, and America's intransigence and aggressive designs.

The most recent edition of the quarterly Newsletter Soviet Disinformation Forecast, contains an article written by Adam Ulam entitled "Countering Soviet Propaganda." Mr. Ulam's article deals with the Soviet peace offensive and how America should respond to Soviet propaganda.

Adam B. Ulam is a recognized expert on the Soviet Union and Soviet foreign policy. He is currently director of the Russian Research Center at Harvard University. He has written extensively on the Soviet Union. His books on Soviet foreign policy include "Expansion and Coexistence, Dangerous Relations," and "The Rivals: America and Russia since WWII."

I think the Daniloff case has given many Americans occasion to again ask some basic questions about the Soviet Union's commitment to peace and the rule of law. Ulam points out in his essay that arms control, though enormously important and desirable, is not in itself the key to peace. The real key to peace is in the policies pursued by the United States and the Soviet Union. Ulam points out that the U.S.S.R. is the main catalyst of troubles on the international scene.

Mr. President, I ask that Adam Ulam's article "Countering Soviet Propaganda" be inserted in the RECORD.

The article follows:

COUNTERING SOVIET PROPAGANDA

(By Adam B. Ulam)

"Friends in peace, enemies in war"—that was what the Founding Fathers believed should be America's attitude towards other nations. An eminently sensible formula, and it served the Republic well, until the world in which it could work reasonably well was irretrievably shattered in 1914. But the legacy of so many years, during which the average American could afford to and did give but scant attention to the world outside the Western hemisphere has lingered on in the national consciousness, and hence our dilemma and puzzlement in the wake of World War II as to how to deal with the Soviet Union.

Here we can concentrate on only one aspect of that neither peace or war situation that has existed between the two superpowers virtually since V-J day: the propaganda campaign waged by the Kremlin against the United States. And to anticipate an immediate rejoinder from the Soviet side, and for that matter from many in the West, let us say: yes, the United States, at least in more recent years, has not been laggard in what is described grandiloquently as the struggle for the hearts and minds of mankind, or to call it more prosaically, the propaganda contest.

But it would be masochistic self-deception to maintain that in this contest both sides observe the same rules. To put it simply, even if it wanted to, the U.S. government could not take the kind of liberties with the fact that the USSR does when it comes to justifying its policies and denouncing those of its rival; Washington cannot match the stridency and persistence of the Kremlin's threats, cajoleries or enticements. Under our system, the voice of the Executive is invariably scrutinized, often criticized, and occasionally denounced by its political opponents, the media, and others. Moscow is entirely free from such scruples and constraints. How then can a democracy remain true to its principles and rules and yet counter the flagrant distortions of its policies and aims that emanate to often from the USSR?

The question is especially acute in the present phase of Soviet-American relations. By the dint of a persistent and well-orchestrated propaganda campaign, Gorbachev and Co. have persuaded many in the West, including the US, that the Soviet Union is genuinely ready to engage in a veritable nuclear "striptease," and that it is the US which because of its goal of achieving nuclear superiority through the SDI, is keeping the world on the brink of a nuclear holocaust. It is clear that the US government's reactions to the Soviet enticements fail to be convincing to many in our own society. It would serve both the interests of truth and of better understanding of the American position if instead of bald asseverations that the Soviet proposals must be a ruse, American spokesmen would try patiently to set the problem in a perspective.

First, as to the proposals themselves: let us examine their detail before we accept them as genuine. Let us not forget that in the past Moscow's tactics on nuclear weapons were clearly intended to establish or enhance its nuclear superiority. It was the USSR which in 1961 broke abruptly the nuclear test moratorium. And soon after SALT I was sealed and signed, they began what might be called an end around play by building and deploying SS-20s. We must heed the lessons of the past—hence the need to scrutinize carefully not only what the Soviets are saying, but also what they are doing.

Then the United States should patiently try to educate world public opinion that nuclear arms control, though enormously important and desirable, is not in itself the key to peace. This key lies in the policies of the two superpowers—weapons themselves don't make wars. No American is losing sleep because of the knowledge that Britain and

France dispose of nuclear weapons that could bring death to tens of millions in this country. For all of American's sins of omission and commission, the fact remains that it is the USSR that is the main catalyst of troubles on the international scene, and it is local crises abetted by the Kremlin that at times threaten to escalate into a nuclear confrontation between the two superpowers. If Gorbachev wants to demonstrate that a new spirit prevails in the Soviets' councils, he should remove the Soviet military presence in Afghanistan and/or stop giving weapons and diplomatic support to regimes such as Qaddafi's. Then the Soviets' proposal about arms control would be much more credible and welcome.

The litmus test of the Soviets' intention to seek the lowering of tension in international affairs lies precisely in what they do about such "regional" issues. It is understandable that they concentrate their propaganda campaign on the question of weapons—fear of a nuclear holocaust is deeply ingrained in all of us. But the danger of war comes not *primarily* from the quantitative aspect of the weapons question, it comes from the expansionist thrust of Soviet foreign policy and from the aggressive and terrorist activities of some of the regimes which are clients and dependents of the USSR.

As the above demonstrates, the most effective antidote to the exaggerations and, to put it mildly, inaccuracies of Soviet official propaganda, does not lie in trying to complete with Moscow in vituperation and stridency. The cause of democracy gains and the Kremlin's hopes are confounded when the counter-arguments offered by the West are their own people. A literal translation of the page of *Pravda* devoted to foreign countries could not but make the reader reflect whether a regime licensing such streams of vituperation and misstatement of facts about the non-Communist countries is really seeking a stable world and a reduction in international tension.

In brief, it is a mistake to assume that the U.S. must be always the loser when it comes to the diplomatic and propaganda game with the USSR or, conversely, that in order to complete it should imitate the latter's tactics and rhetoric. The Soviets can recognize and respect when their opponents display tenacity of purpose, and when their tone is firm but not abusive. Absence of effective public criticism seemingly affords the Kremlin much more freedom of action than is possible for a democracy. At the same time the lack of criticism at times leads the Soviet leaders to serious errors of judgment from a public relations point of view. They did not realize that their pledges concerning human rights in the Helsinki Declarations would be taken seriously and would continue to embarrass them at home and abroad. They have displayed gross insensitivity to the national feelings of the Japanese by refusing even to negotiate about a few small islands. Instead of being content with a Finland-type relationship with Afghanistan, they embraced the Communist coup there in 1978 and have incurred a lot of trouble since.

Perhaps, even though dimly, some Soviet leaders may be beginning to perceive that in the search for expansion the USSR has overextended itself, and that its policies in Ethiopia, Libya, Angola, and elsewhere do not contribute to the security of the Soviet state and regime—if anything, the opposite. But such perceptions will not be transmuted into actual policies, unless the West for its part displays a tenacity of purpose and the ability to educate world public opinion about the real prerequisits for a real peace.●

ABORTION AND INFORMED CONSENT: ARKANSAS

● Mr. HUMPHREY. Mr. President, I am continuing my presentation of letters which I have received from women across the Nation who profoundly regret the decision to abort their unborn children. I am presenting them in alphabetical order by State.

Cindy in Arkansas describes another example of the myopic counseling women receive in abortion clinics. She expresses fear for other women who will be submitted to the same ideological indoctrination she received without ever knowing the facts about abortion. She poignantly related the pain she felt when she discovered that she had killed a child. Indeed, she attributes part of the soaring teenage suicide rate to abortion.

When this young woman became pregnant she was lonely and unable to share her burden. She needed compassion, candor and honesty. Instead, she received nonsensical euphemisms. No one gave her enough information to make an intelligent decision for herself. As a result, she was grossly unprepared to live with the consequences of this momentous decision. Many women have had this experience and so will many more, as long as these so-called counselors are allowed to demean women in this fashion.

Mr. President, I am appalled by the superficiality of the counseling which most women receive prior to an abortion. I am amazed by the lack of preparation most of them recount. And I am outraged by the stifling of truth which I see among abortionists, and their support staffs. This is why I believe a legal requirement for informed consent is necessary for the well-being of women in this Nation. I am convinced that fewer women would choose this alternative if they knew more about the true consequences.

I urge my colleagues to reflect carefully upon this young woman's complaint. If we are to avoid further abuses of this sort I hope they will join me in cosponsoring S. 2791.

The letter follows:

MAY 22, 1986.

DEAR SIR: I am Cindy Case, 31, of Little Rock, Arkansas. This letter is written in support of your action concerning "Informed Consent" in reference to the abortion issue.

I was raised in the generation when most parents never talked about sex and never let their children talk about it either. Therefore, I grew up sheltered from the reality of getting pregnant in the first place. When I was 25 years old, I got pregnant out of wedlock. I wasn't promiscuous. I was searching for love but got into trouble in the process. I did not want to tell my close friends because we were all sitting on the same church pew. I had made a mistake and I thought the church would ask me to leave if they found out.

I had to tell someone. Finally, I told an acquaintance. She told me I could have an abortion and no one would ever have to know. I didn't even know what an abortion was. All I knew was I wouldn't be pregnant anymore. I thought I could forget about it and continue my life and hopefully not make the same mistake again.

I called the number she gave me and the nurse said they have a simple procedure that only takes around five minutes of your time. "We remove the tissue that was formed at conception and you don't leave here with the same problem you had when you came in."

I felt a lot of guilt after that but it was mainly because I had done wrong in the eyes of God by getting pregnant out of wedlock, not because I had commited murder. I found that out three-and-a-half years later when I saw the babies in the trash can on TV. I didn't really know what I had done until then.

I want everyone to know the truth, the whole truth. I know we can make a difference if we can get into the schools and reach the girls before they get pregnant. I know drugs, peer pressure, unhappy home life and many other things cause teen-age suicides, but I feel it is one of the more serious aftermaths of abortion.

Someday, I hope to have the support of our two Senators from Arkansas.

Sincerely,

CINDY.

LITTLE ROCK, ARK.●

KELLYE CASH CHOSEN TO BE MISS AMERICA 1987

● Mr. SASSER. Mr. President, I would like to take this opportunity to join with the citizens of Tennessee in congratulating Miss Kellye Cash upon winning the title of Miss America 1987. Miss Cash was selected last Saturday night at the annual Miss America Pageant in Atlantic City, NJ, among contestants from all 50 States and the District of Columbia.

Kellye Cash exemplifies the ideal young American woman that the Miss America Pageant honors every year. She is exceptionally bright, hardworking, and talented. A senior at Memphis State University, Miss Cash is majoring in communications and public relations. She has helped pay for her education by working two part-time jobs. Her tremendous musical talent was clearly evident when she brought the audience at the Miss America Pageant to its feet after playing the piano and singing the pop-blues song, "I'll Be Home."

I am confident that Miss Cash will be an excellent representative of the Miss America Pageant during the course of her 1-year reign and in the years after. It is extremely refreshing to hear a young woman say today, as Miss Cash does, that she wants to maintain that "girl-next-door" image. At a time when we are becoming increasingly concerned about drug abuse among young people, I believe she will

serve as a positive role model for all young Americans.

Kellye Cash makes all Tennesseans proud but I am sure none are more proud than her parents, Billie and Roy Cash, Jr. Her mother and father also deserve special credit for raising such an outstanding young woman. The Cash family is already legendary in Tennessee, and Kellye now joins her granduncle, country music star Johnny Cash, and his daughter, singer Roseanne Cash, as entertainment celebrities.

I am pleased, Mr. President, that such an energetic and talented young woman has been chosen as Miss America. Her selection is richly deserved.●

BUDGET SCOREKEEPING REPORT

● Mr. DOMENICI. Mr. President, I hereby submit to the Senate the budget scorekeeping report for this week, prepared by the Congressional Budget Office in response to section 308(b) of the Congressional Budget Act of 1974, as amended. This report also serves as the scorekeeping report for the purposes of section 311 of the Budget Act.

The report follows:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, DC, September 15, 1986.

Hon. PETE V. DOMENICI,
Chairman, Committee on the Budget, U.S. Senate, Washington, DC

DEAR MR. CHAIRMAN: The attached report shows the effects of congressional action on the budget for fiscal years 1986 and 1987. The estimated totals of budget authority, outlays, and revenues for each fiscal year are compared to the appropriate or recommended levels contained in the most recent budget resolutions, Senate Concurrent Resolution 32 for fiscal year 1986, and Senate Concurrent Resolution 120 for fiscal year 1987. This report meets the requirements for Senate scorekeeping of section 5 of Senate Concurrent Resolution 32 and is current through September 12, 1986. The report is submitted under section 308(b) and in aid of section 311 of the Congressional Budget Act, as amended.

No changes have occurred since my last report.

With best wishes,

Sincerely,

RUDOLPH G. PENNER.
Director.

CBO WEEKLY SCOREKEEPING REPORT FOR THE U.S. SENATE, 99TH CONGRESS, 2d SESSION, AS OF SEPTEMBER 12, 1986

[Fiscal year 1986—in billions of dollars]

	Current level [1]	Budget resolution S. Con. Res. 32	Current level +/− resolution
Budget authority	1,053.0	1,069.7	−16.7
Outlays	980.0	967.6	12.4
Revenues	778.5	795.7	−17.2
Debt subject to limit	2,092.8	[2] 2,078.7	14.1

[1] The current level represents the estimated revenue and direct spending effects (budget authority and outlays) of all legislation that Congress has enacted in this or previous sessions or sent to the President for his approval. In addition, estimates are included of the direct spending effects for all entitlement or other programs requiring annual appropriations under current law even though the appropriations have not been made. The current level of debt subject to limit reflects the latest U.S. Treasury information on public debt transactions.

[2] The current statutory debt limit is $2,111.0 billion.

CBO WEEKLY SCOREKEEPING REPORT FOR THE U.S. SENATE, 99th CONGRESS, 2d SESSION, AS OF SEPTEMBER 12, 1986

[Fiscal year 1987—in billions of dollars]

	Current level [1]	Budget resolution S. Con. Res. 120	Current level +/− resolution
Budget authority	636.2	1,093.4	−457.1
Outlays	737.3	995.0	−257.7
Revenues	845.6	852.4	−6.8
Debt subject to limit	2,092.8	[2] 2,322.8	−230.0
Direct loan obligations	20.4	34.6	−14.1
Guaranteed loan commitments	33.1	100.8	−67.7

[1] The current level represents the estimated revenue and direct spending effects (budget authority and outlays) of all legislation that Congress has enacted in this or previous sessions or sent to the President for his approval. In addition, estimates are included of the direct spending effects for all entitlement or other programs requiring annual appropriations under current law even though the appropriations have not been made. The current level of debt subject to limit reflects the latest U.S. Treasury information on public debt transactions.

[2] The current statutory debt limit is $2,111.0 billion.

FISCAL YEAR 1986 SUPPORTING DETAIL FOR CBO WEEKLY SCOREKEEPING REPORT, U.S. SENATE 99th CONGRESS, 2d SESSION AS OF SEPTEMBER 12, 1986

[IN MILLIONS OF DOLLARS]

	Budget authority	Outlays	Revenues
I. Enacted in previous sessions:			
Revenues			777,794
Permanent appropriations and trust funds	723,461	629,772	
Other appropriations	525,778	544,947	
Offsetting receipts	−188,561	−188,561	
Total enacted in previous sessions	1,060,679	986,159	777,794
II. Enacted this session:			
Commodity Credit Corporation Urgent Supplemental Appropriation, 1986 (Public Law 99–243)			
Federal Employees Benefits Improvement Act of 1986 (Public law 99–251)		4	
VA Home Loan Guarantee Amendments (Public Law 99–255)		51	
Omnibus Budget Reconciliation Act of 1985 (Public Law 99–272)	−4,259	−6,001	765
Department of Agriculture Urgent Supplemental, 1986 (Public Law 99–263)			
Advance to Hazardous Substance Response Trust Fund (Public Law 99–270)			
FHA and GNMA Credit Commitment Assistance Act (Public Law 99–289)		380	
Federal Employees Retirement Act of 1986 (Public Law 99–335)			−90
Temporary Extension of Certain Housing Programs (Public Law 99–345)		−304	
Military Retirement Reform Act (Public Law 99–348)	−25		
Urgent Supplemental Appropriations, 1986 (Public Law 99–349)	−3,508	475	
Panama Canal Commission Authorizing Act (Public Law 99–368)	18	16	
Total	−7,773	−6,240	675
III. Continuing resolution authority			
IV. Conference agreements ratified by both Houses			
V. Entitlement authority and other mandatory items requiring further appropriation action:			
Compact of free association	3	3	
Special benefits (federal employees)	14	14	
Family social services	100	75	
Payment to civil service retirement [1]	(37)	(37)	
Total entitlements	118	93	
Total current level as of September 12, 1986	1,053,024	980,012	778,469
1986 budget resolution (S. Con. Res. 32)	1,069,700	967,600	795,700
Amount remaining:			
Over budget resolution		12,412	
Under budget resolution	16,676		17,231

[1] Interfund transactions do not add to budget totals.

Note–Numbers may not add due to rounding.

FISCAL YEAR 1987 SUPPORTING DETAIL FOR CBO WEEKLY SCOREKEEPING REPORT, U.S. SENATE, 99th CONGRESS, 2d SESSION, AS OF SEPTEMBER 12, 1986

[In millions of dollars]

	Budget authority	Outlays	Revenues
I. Enacted in previous sessions:			
Revenues			843,799
Permanent appropriations and trust funds	733,558	647,692	
Other appropriations		195,861	
Offsetting receipts	−163,823	−163,823	
Total enacted in previous sessions	569,735	679,730	843,799
II. Enacted this session:			
Federal Employees Benefits Improvement Act of 1986 (Public Law 99–251)		2	
Technical Corrections Amends to Food Security Act (Public Law 99–253)	50	50	
VA Home Loan Guarantee Amendments (Public Law 99–255)		49	
Food Security Improvements Act of 1986 (Public Law 99–260)	−115	−115	
White Earth Reservation Land Settlement Act of 1985 (Public Law 99–264)	10	10	
Consolidated Omnibus Budget Reconciliation Act of 1986 (Public Law 99–272)	155	−3,553	2,503
FHA and GNMA Credit Commitment Assistance Act (Public Law 99–289)		−178	
Federal Employees' Retirement System Act of 1986 (Public Law 99–335)	−150	−1,670	−666
Judicial Improvements Act (Public Law 99–336)	2		
Temporary Extension of Certain Housing Programs (Public Law 99–345)		−85	
Military Retirement Reform Act (Public Law 99–348)	−47	146	
Urgent Supplemental Appropriations, 1986 (Public Law 99–349)	−278	−914	
Panama Canal Commission Authorizing Act (Public Law 99–368)		2	
Omnibus Diplomatic Security and Anti-Terrorism Attack Act (Public Law 99–399)	1	1	
Children's Justice and Assistance Act (Public Law 99–401)	10		
Total enacted this session	−362	−6,254	1,837
III. Continuing resolution authority			
IV. Conference agreements ratified by both Houses			
V. Entitlement authority and other mandatory items requiring further appropriation action:			
Payment to the CIA retirement fund	126	126	
Claims, defense	156	150	
Payment to the foreign service retirement trust fund [2]	(173)	(173)	
Range improvements	10	7	

FISCAL YEAR 1987 SUPPORTING DETAIL FOR CBO WEEKLY SCOREKEEPING REPORT, U.S. SENATE, 99th CONGRESS, 2d SESSION, AS OF SEPTEMBER 12, 1986—Continued

[In millions of dollars]

	Budget authority	Outlays	Revenues
BLM: Miscellaneous trust fund	(1)	(1)	
Compact of free association	42	42	
Administration of territories	35	30	
Payments to air carriers, DOT	32	30	
Retired pay—Coast Guard	370	341	
Maritime, operating-differential subsidies		297	
BIA: Miscellaneous trust funds	1	1	
Social services block grant	2,700	2,538	
Family social services	758	584	
Guaranteed student loans	3,219	2,580	
Higher education facilities loans and insurance	19		
Government payment for annuitants	1,459	1,301	
Retirement pay for PHS officers	83	81	
Medicaid	19,595	19,241	
Medical facilities guarantee and loan fund	20	19	
Payments to health care trust funds [2]	(20,826)	(20,826)	
Special milk program	16	11	
Child nutrition programs	4,212	3,791	
Federal unemployment benefits and allowances	103	102	
Advances to unemployment trust fund [2]	(9)	(9)	
Special benefits (general retirement and federal employee retirement)	257	257	
Black lung disability trust fund	549	549	
Supplemental security income	7,846	7,846	
Special benefits for disabled coal miners	698	638	
Assistance payments	7,350	7,350	
Child support enforcement	599	583	
Payments to social security trust funds [2]	(501)	(501)	
Veterans insurance and indemnities	5	4	
Veterans readjustment benefits	750	723	
Veterans compensation	10,300	9,360	
Veterans pensions	3,684	3,385	
Veterans burial benefits	138	138	
Salaries of judges	104	103	
Fees and expenses of witnesses	46	37	
Compensation of the President	(1)	(1)	
Payment to civil service retirement trust fund [2]	(4,557)	(4,557)	
National wildlife refuge fund	6	6	
Military pay raises and benefits	1,566	1,539	
Total entitlements	66,855	63,793	
Total current level as of Sept. 12, 1986	636,227	737,268	845,636
1987 budget resolution (S. Con. Res. 120)	1,093,350	995,000	852,400
Amount remaining:			
Over budget resolution			
Under budget resolution	457,123	257,732	6,764

[1] Less than $500 thousand.
[2] Interfund transactions do not add to budget totals.
Note.—Numbers may not add due to rounding.●

ARTHUR DORMAN

● Mr. SARBANES. Mr. President, I want to bring to our colleagues' attention the record of distinguished service of Maryland State senator for Prince Georges County, Arthur Dorman, O.D. On Saturday, September 20, Beth Torah Congregation is honoring Senator Dorman as "Man of the Decade" for his dedication to the community and for 26 years as a member of its congregation. It gives me great pleasure to join with members of his family and of Beth Torah in honoring Senator Dorman, for in addition to being a strong and effective leader in the Maryland General Assembly, the Beth Torah Congregation, and the Prince Georges community, he is a close friend.

One of the joys and rewards of politics and public service is the opportunity to make friends with those individuals who care deeply about the public interest. By anyone's definition, Arthur Dorman fits the roles of "public servant" and "citizen" as well as being a strong leader in the Beth Torah Congregation since joining in 1960.

I had the privilege of serving with Arthur Dorman during my 4 years in the Maryland General Assembly and since that time we have continued to work on issues of mutual concern. There is no question that his distinguished record of service to the State and community has been characterized by commitment to the highest standards of integrity and leadership and his receiving the "Man of the Year" award is testimony to this.

Since coming to Maryland when Dr. Dorman began his optometry practice in 1953, our fellow citizens have benefitted from over three decades of his active participation in the community as a member and leader in organizations too numerous to list. Throughout his 22 years as a legislator Senator Dorman has worked hard and effectively, particularly on health and education issues. He was primarily responsible for mental health coverage by private insurance companies and helped to start the National Vision Institute of America, one of the first prepaid vision insurance plans. He has demonstrated a particular interest in educating our youth, whether as executive board member of the Southern Regional Education Board—coordinating higher education activities among 14 Southern States—or as Senator Dorman teaching history class for a day in his local high school.

Arthur Dorman has not only been a skillful legislator, dedicated to fairness and opportunity, and a respected optometrist, having been voted both Maryland and National Optometrist of the Year, he has also given selflessly to his synagogue, where he has held various offices through the years and presently serves as a trustee and substitute rabbi. He has been instrumental in the growth and financial stability of Beth Torah Congregation and in promoting interdenominational learning experiences on both the youth and adult levels. He does not limit his generosity to Beth Torah but assists other synagogues in the community as well.

Arthur Dorman's contributions as a religious, community, and public leader are eloquent testimony to the dedication and ability he has brought to Prince Georges County and to the State. The "Man of the Decade" award justifiably pays tribute to his hard work and genuine commitment to his fellow man. Again, I am pleased to join in honoring him for his many years of devoted service both to the highest ideals of Beth Torah Congregation and, on a broader level, to the community.●

HAPPY 100TH BIRTHDAY TO THE TIMES-ADVOCATE

● Mr. WILSON. Mr. President, I am delighted to join with admirers of first-class journalism everywhere in congratulating the Times-Advocate of Escondido, CA, on its 100th birthday.

The world has turned over many times since a four-page sheet called the Escondido Times first circulated through a frontier settlement of 1,500 people. The gasoline-powered linotype on grand avenue has long since given way to state-of-the-art equipment. Escondido has grown to include over 60,00 residents, expecting—and receiving—the widest possible range of information, entertainment, and opinion.

Before city hall, before the railway, even before Escondido was incorporated as a city, there was the Escondido Times. And although the Times began as an organ of the Escondido Land & Town Co. to lure folks to the new town of Escondido, the Times-Advocate in its recent history has established a reputation for independent news coverage of high quality.

A good newspaper, it's been said, is a community talking with itself. The Times-Advocate has become as vital to Escondido's civic life as water is to the region's economy. And just as the city it serves is no longer "hidden" between the mountains and the sea, so the paper has won repeated and deserved recognization for the quality of its news coverage and photojournalism.

Escondido sits in the shadow of Mt. Palomar. The Escondido Times-Advocate is in no one's shadow.

I wish the Times-Advocate and its employees all the best, on the occasion of the publication of this centennial celebration issue, and for all the issues to come.●

REHABILITATION ACT AMENDMENTS

Mr. DOLE. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on H.R. 4021.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the House disagree to the amendment of the Senate to the bill (H.R. 4021) entitled "An Act to extend and improve the Rehabilitation Act of 1973", and ask a conference with the Senate on the disagreeing votes of the two Houses thereon.

Ordered, That Mr. Hawkins, Mr. Biaggi, Mr. Williams, Mr. Martinez, Mr. Hayes, Mr.

Eckart of Ohio, Mr. Waldon, Mr. Jeffords, Mr. Goodling, Mr. Coleman of Missouri, and Mr. Bartlett be the managers of the conference on the part of the House.

Mr. DOLE. Mr. President, I move that the Senate insist on its amendment and agree to the conference requested by the House and that the Chair be authorized to appoint conferees on the part of the Senate.

The motion was agreed to.

Mr. DOLE. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. BYRD. I move to lay that motion on the table.

The Chair appointed Mr. HATCH, Mr. WEICKER, Mr. STAFFORD, Mr. NICKLES, Mr. THURMOND, Mr. KERRY, Mr. SIMON, Mr. KENNEDY, and Mr. DODD conferees on the part of the Senate.

COLORADO RIVER FLOODWAY PROTECTION ACT

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 886, S. 1696, dealing with the Colorado River.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (S. 1696) to establish a federally declared floodway for the Colorado River below Davis Dam.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceed to consider the bill, which had been reported from the Committee on Environment and Public Works, with amendments, as follows:

(The parts of the bill intended to be stricken are shown in boldface brackets, and the parts of the bill intended to be inserted are shown in italics.)

S. 1696

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Colorado River Floodway Protection Act".

FINDINGS AND PURPOSES

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) there are multiple purposes established by law for the dams and other control structures administered by the Secretary of the Interior on the Colorado River;

(2) the maintenance of the Colorado River Floodway established in this Act is essential to accomplish these multiple purposes;

(3) developments within the Floodway are and will continue to be vulnerable to damaging flows such as the property damage which occurred in 1983 and may occur in the future;

(4) certain Federal programs which subsidize or permit development within the Floodway threaten human life, health, property, and natural resources; and

(5) there is a need for coordinated Federal, State, and local action to limit Floodway development.

(b) PURPOSE.—The Congress declares that the purposes of this Act are to—

(1) establish the Colorado River Floodway, as designated and described further in this Act, so as to provide benefits to river users and to minimize the loss of human life, protect health and safety, and minimize damage to property and natural resources by restricting future Federal expenditures and financial assistance, except public health funds, which have the effect of encouraging development within the Colorado River Floodway; and

(2) establish a task force to advise the Secretary of the Interior and the Congress on establishment of the Floodway and on managing existing and future development within the Floodway, including the appropriateness of compensation in specified cases of extraordinary hardship.

DEFINITIONS

SEC. 3. (a) The term "Committees" refers to the Committee on Interior and Insular Affairs of the U.S. House of Representatives and *the Committee on Environment and Public Works and* the Committee on Energy and Natural Resources of the U.S. Senate.

(b) The term "financial assistance" means any form of loan, grant, guaranty, insurance, payment, rebate, subsidy, or any other form of direct or indirect Federal assistance other than—

(1) general revenue-sharing grants made under section 102 of the State and Local Fiscal Assistance Amendments of 1972 (31 U.S.C. 1221);

(2) deposit or account insurance for customers of banks, savings and loan associations, credit unions, or similar institutions;

(3) the purchase of mortgages or loans by the Government National Mortgage Association, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation;

(4) assistance for environmental studies, plans, and assessments that are required incident to the issuance of permits or other authorizations under Federal law; and

(5) assistance pursuant to programs entirely unrelated to development, such as any Federal or federally assisted public assistance program or any Federal old-age, survivors, or disability insurance program.

Such term also includes flood insurance described in sections 1322 (a) and (b) of the National Flood Insurance Act of 1968, [as amended (42 U.S.C. 4028)] *Public Law 90-448, title XIII (82 Stat. 572) as amended,* on and after the dates on which the provisions of those sections become effective.

(c) The term "Secretary" means the Secretary of the Interior.

(d) The term "water district" means any public agency providing water service, including water districts, county water districts, public utility districts, and irrigation districts.

(e) The term "Floodway" means the Colorado River Floodway established in section 5 of this Act.

COLORADO RIVER FLOODWAY TASK FORCE

SEC. 4. (a) To advise the Secretary and the Congress there shall be a Colorado River Floodway Task Force, which shall include [representatives] *one representative* of—

(1) each State (appointed by the Governor) and Indian reservation in which the Floodway is located;

(2) each county in which the Floodway is located;

(3) [one] *a* law enforcement [representative] *agency* from each county in which the Floodway is located; and

(4) each water district in which the Floodway is located;

(5) the cities of Needles, Parker, Blythe, Bullhead City, Yuma, Laughlin, *Lake Havasu City,* Nevada (if and when incorporated), and Mojave County, Arizona Supervisor District No. 2 (chosen by, but not a member of the Board of Supervisors);

(6) [one representative] of the Chamber of Commerce from each county in which the Floodway is located;

(7) the Colorado River Wildlife Council;

[(7)] *(8)* the Army Corps of Engineers;

[(8)] *(9)* the Federal Emergency Management Agency (FEMA);

[(9)] *(10)* the Department of Agriculture;

[(10)] *(11)* the Department of the Interior; and

[(11)] *(12)* the Department of State.

(b) The task force shall be chartered and operate under the provisions of the Federal Advisory Committee Act (Public Law 92-463; 5 U.S.C. App. I) and shall prepare recommendations concerning the Colorado River Floodway, which recommendations shall deal with:

(1) the means to restore and maintain the Floodway specified in section 5 of this Act, including, but not limited to, specific instances where land transfers or relocations, or other changes in land management, might best effect the purposes of this Act; and

(2) the necessity for additional Floodway management legislation at local, *tribal,* State, and Federal levels;

(3) the development of specific design criteria for the creation of the Floodway boundaries;

(4) the review of mapping procedures for Floodway boundaries; [and]

(5) whether compensation should be recommended in specific cases of [extraordinary] *economic* hardship resulting from impacts of the 1983 flood on property outside the Floodway which could not reasonably have been foreseen; *and*

(6) the potential application of the Floodway on Indian lands and recommended legislation or regulations that might be needed to achieve the purposes of the Floodway taking into consideration the special Federal status of Indian lands.

(c) The task force shall exist for at least one year after the date of enactment of this Act, or until such time as the Secretary has filed with the Committees the maps described in subsection 5(b)(2). The task force shall file its report with the Secretary and the Committees within nine months after the date of enactment of this Act.

COLORADO RIVER FLOODWAY

SEC. 5. (a) There is established the Colorado River Floodway as identified and generally depicted on maps that are to be submitted by the Secretary.

(b)(1) Within eighteen months after the date of enactment of this Act, the Secretary, in consultation with the seven Colorado River Basin States, represented by persons designated by the Governors of those States, [(including, in the Governor's discretion, members of the Colorado River Floodway Task Force),] *the Colorado River Floodway Task Force,* and any other interested parties shall:

(i) complete a study of the tributary floodflows downstream of Davis Dam;

(ii) define the specific boundaries of the Colorado River Floodway so that the Flood-

way can accommodate either a one-in-one hundred year river flow consisting of controlled releases and tributary inflow, or a flow of forty thousand cubic feet per second (cfs), whichever is greater, from below Davis Dam to the Southerly International Boundary between the United States of America and the Republic of Mexico.

(2) As soon as practicable after the determination of the Floodway boundary pursuant to this subsection, the Secretary shall prepare and file with the Committees maps depicting the Colorado River Floodway, and each such map shall be considered a standard map to be adhered to by all agencies and shall have the same force and effect as if included in this Act, except that correction of clerical and typographical errors in each such map may be made. Each such map shall be on file and available for public inspection in the Office of the Commissioner of the Bureau of Reclamation, Department of the Interior, and in other appropriate offices of the Department.

(3) The Secretary shall provide copies of the Colorado River Floodway maps to (A) the chief executive officer of each State, county, municipality, water district, Indian tribe, or equivalent jurisdiction in which the Floodway is located, (B) each appropriate Federal agency, including agencies which regulate Federal financial institutions, and (C) each federally insured financial institution which serves the geographic area as one of its primary markets.

(c)(1) The Secretary shall conduct, at least once every five years, a review of the Colorado River Floodway and make, after notice to and in consultation with the appropriate officers referred to in paragraph (3) of subsection (b), and others, such minor and technical modifications to the boundaries of the Floodway as are necessary solely to reflect changes that have occurred in the size or location of any portion of the floodplain as a result of natural forces, and as necessary pursuant to subsection (c) of section (7) of this Act.

(2) If, in the case of any minor and technical modification to the boundaries of the Floodway made under the authority of this subsection, an appropriate chief executive officer of a State, county, municipality, water district, Indian tribe, or equivalent jurisdiction, to which notice was given in accordance with this subsection files comments disagreeing with all or part of the modification and the Secretary makes a modification which is in conflict with such comments, the Secretary shall submit to the chief executive officer a written justification for his failure to make modifications consistent with such comments or proposals.

LIMITATIONS ON FEDERAL EXPENDITURES AFFECTING THE FLOODWAY

SEC. 6. (a) Except as provided in section 7, no new expenditures or new financial assistance may be made available under authority of any Federal law for any purpose within the Floodway established under section 5 of this Act.

(b) An expenditure or financial assistance made available under authority of Federal law shall, for purposes of this Act, be a new expenditure or new financial assistance if—

(1) in any case with respect to which specific appropriations are required, no money for construction or purchase purposes was appropriated before the date of the enactment of this Act; or

(2) no legally binding commitment for the expenditure or financial assistance was made before such date of enactment.

EXCEPTIONS

SEC. 7. Notwithstanding section 6, the appropriate Federal officer, after consultation with the Secretary, may make Federal expenditures or financial assistance available within the Colorado River Floodway for—

(a) any dam, channel or levee construction, operation or maintenance for the purpose of flood control, water conservation, power or water quality;

(b) other remedial or corrective actions, including but not limited to drainage facilities essential to assist in controlling adjacent high ground water conditions caused by flood flows;

(c) the maintenance, replacement, reconstruction, repair, and expansion, of [federally assisted and publicly] *publicly or tribally* owned or [publicly] operated roads, structures (including bridges), or facilities; *Provided,* That, no such expansion shall be permitted unless—

(1) the expansion is designed and built in accordance with the procedures and standards established in section 650.101 of title 23, Code of Federal Regulations, and the following as they may be amended from time to time; and

(2) the boundaries of the Floodway are adjusted to account for changes in flows caused, directly or indirectly, by the expansion;

(d) military activities essential to national security;

(e) any of the following actions or projects, but only if the Secretary finds that the making available of expenditures or assistance therefor is consistent with the purposes of this Act:

(1) Projects for the study, management, protection and enhancement of fish and wildlife resources and habitats, including, but not limited to, acquisition of fish and wildlife habitats and related lands, stabilization projects for fish and wildlife habitats, and recreational projects.

(2) The establishment, operation, and maintenance of air and water navigation aids and devices, and for access thereto.

(3) Projects eligible for funding under the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-4 through 11).

(4) Scientific research, including but not limited to aeronautical, atmospheric, space, geologic, marine, fish and wildlife and other research, development, and applications.

(5) Assistance for emergency actions essential to the saving of lives and the protection of property and the public health and safety, if such actions are performed pursuant to sections 305 and 306 of the Disaster Relief Act of 1974 (42 U.S.C. 5145 and 5146) and are limited to actions that are necessary to alleviate the emergency. Disaster assistance under other provisions of the Disaster Relief Act of 1974 (Public Law 93-288, as amended) may also be provided with respect to persons residing within the Floodway, or structures or public infrastructure in existence or substantially under construction therein, on the date ninety days after the date of enactment of this Act: *Provided,* That, such persons, or with respect to public infrastructure the State or local political entity which owns or controls such infrastructure, had purchased flood insurance for structures or infrastructure under the National Flood Insurance Program, if eligible, and had taken prudent and reasonable steps, as determined by the [Secretary,] *Director of the Federal Emergency Management Agency,* to minimize damage from future floods or operations of the Floodway established in the Act.

(6) Other assistance for public health purposes, such as mosquito abatement programs.

(7) Nonstructural projects for riverbank stabilization that are designed to enhance or restore natural stabilization systems.

(8) Publicly *or tribally* financed, owned and operated compatible recreational developments such as regional parks, golf courses, docks, [and] boat [landing] *launching* ramps *(including steamboat and ferry landings), including compatible recreation uses and accompanying utility or interpretive improvements which are essential or closely related to the purpose of restoring the accuracy of a National Historical Landmark and which meet best engineering practices considering the nature of Floodway conditions.*

(9) Compatible agricultural uses that do not involve permanent crops and include only a minimal amount of permanent facilities in the Floodway.

CERTIFICATION OF COMPLIANCE

SEC. 8. The Secretary of the Interior shall, on behalf of each Federal agency concerned, make written certification that each agency has complied with the provisions of this Act during each fiscal year beginning after September 30, 1985. Such certification shall be submitted on an annual basis to the U.S. House of Representatives and the U.S. Senate on or before January 15 of each fiscal year.

PRIORITY OF LAWS

SEC. 9. Nothing contained in this Act shall be construed to alter, amend, repeal, modify, interpret, or be in conflict with the provisions of the Colorado River Compact (45 Stat. 1057), the Upper Colorado River Basin Compact (63 Stat. 31), the Water Treaty of 1944 with the United Mexican States (Treaty Series 944, 59 Stat. 1219), the Flood Control Act of 1944 (58 Stat. 887), the decree entered by the Supreme Court of the United States in Arizona v. California, and others (376. U.S. 340), the Boulder Canyon Project Act (45 Stat. 1057), the Boulder Canyon Project Adjustment Act (54 Stat. 774; 43 U.S.C. 618a), the Colorado River Storage Project Act (70 Stat. 105; 43 U.S.C. 620), the Colorado River Basin Project Act (82 Stat. 885; 43 U.S.C. 1501). Furthermore, nothing contained in this Act shall be construed as indicating an intent on the part of the Congress to change the existing relationship of other Federal laws to the law of a State, or a political subdivision of a State, or to relieve any person of any obligation imposed by any law of any State, *tribe,* or political subdivision of a State. No provision of this Act shall be construed to invalidate any provision of State, *tribal,* or local law unless there is a direct conflict between such provision and the law of the State, or political subdivision of the State *or tribe,* so that the two cannot be reconciled or consistently stand together. Inconsistencies shall be reviewed by the task force, and the task force shall make recommendations concerning such local laws. This Act shall in no way be interpreted to interfere with a State's or tribe's right to protect, rehabilitate, preserve, and restore lands within its established boundary.

SEPARABILITY

SEC. 10. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons not similarily situated or to

other circumstances shall not be affected thereby.

REPORTS TO CONGRESS

SEC. 11. Within one year after the date of the enactment of this Act, the Secretary shall prepare and submit to the Committees a report regarding the Colorado River Floodway, the task force's report, and the Secretary's recommendations with respect to the objectives outlined in section 4(b) of this Act. *In making his report, the Secretary shall analyze the effects of this Act on the economic development of the Indian tribes whose lands are located within the Floodway.*

AMENDMENTS REGARDING FLOOD INSURANCE

SEC. 12. (a) The National Flood Insurance Act of 1968, [(42 U.S.C. 4028)] *Public Law 90-448, title XIII (82 Stat. 572), as amended,* is amended by adding the following section:

"Sec. 1322. (a) Owners of existing National Flood Insurance Act policies with respect to structures located within the Floodway established under section 5 of the Colorado River Floodway Protection Act shall have the right to renew and transfer such policies. Owners of existing structures located within said Floodway on the date of enactment of the Colorado River Floodway Protection Act who have not acquired National Flood Insurance Act policies shall have the right to acquire policies with respect to such structures for six months after the Secretary of the Interior files the Floodway maps required by section 5(b)(2) of the Colorado River Floodway Protection Act and to renew and transfer such policies.

"(b) No new flood insurance coverage may be provided under this title on or after a date six months after the enactment of the Colorado River Floodway Protection Act for any new construction or substantial improvements of structures located within the Colorado River Floodway established by section 5 of the Colorado River Floodway Protection Act. New construction includes all structures that are not insurable prior to that date.

"(c) The Secretary of the Interior may by rule after notice and comment pursuant to 5 U.S.C. 553 establish temporary Floodway boundaries to be in effect until the maps required by Section 5(b)(2) of the Colorado River Floodway Protection Act are filed, for the purpose of enforcing subsections (b) and [(c)] *(d)* of this section.

"(d) A federally supervised, approved, regulated or insured financial institution may make loans secured by structures which are not eligible for flood insurance by reason of this section; *Provided,* That prior to making such a loan, such institution determines that the loans or structures securing the loan are within the Floodway."

FEDERAL LEASES

SEC. 13. (a) No lease of lands owned in whole or in part by the United States and within the Colorado River Floodway shall be granted after the date of enactment of this Act unless the Secretary determines that such lease would be consistent with the operation and maintenance of the Colorado River Floodway.

(b) No existing lease of lands owned in whole or in part by the United States and within the Colorado River Floodway shall be extended beyond the date of enactment of this Act or the stated expiration date of its current term, whichever is later, unless the lessee agrees to take reasonable and prudent steps determined to be necessary by the Secretary to minimize the inconsistency of operation under such lease with the operation and maintenance of the Colorado River Floodway.

(c) No lease of lands owned in whole or part by the United States between Hoover Dam and Davis Dam below elevation 655.0 feet on Lake Mohave shall be granted unless the Secretary determines that such lease would be consistent with the operation of Lake Mohave.

(d) The provisions of subsections (a) and (b) of this section shall not apply to lease operations on Indian lands pursuant to a lease providing for activities which are exempted under section 7 of this Act.

(e) Subsections (a) and (b) of this section shall not apply to lands held in trust by the United States for the benefit of any Indian tribe or individual with respect to any lease where capital improvements, and operation and maintenance costs are not provided for by Federal financial assistance if the lessee, tribe, or individual has provided insurance or other security for the benefit of the Secretary sufficient to insure against all reasonably forseeable, direct, and consequential damages to the property of the tribe, private persons, and the United States, which may result from the proposed lease.

NOTICES AND EXISTING LAWS

SEC. 14. (A)(1) Nothing in this Act shall alter or affect in any way the provisions of section 702c of title 33, United States Code.

(2) The Secretary shall provide notice of the provisions of section 702c of title 33, United States Code, and this Act to all existing and prospective lessees of lands leased by the United States and within the Colorado River Floodway.

(b) Except as otherwise specifically provided in this Act, all provisions of the National Flood Insurance Act of 1968, as amended, and requirements of the National Flood Insurance Program ("NFIP") shall continue in full force and effect within areas wholly or partially within the Colorado River Floodway. Any maps or other information required to be prepared by this Act shall be used to the maximum extent practicable to support implementation of the NFIP.

(c) The Secretary shall publish notice on three successive occasions in newspapers of general circulation in affected communities of the provisions of section 12(a), (a) of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 15. There is authorized to be appropriated to the Department of the Interior $600,000, through the end of fiscal year 1990, in addition to any other funds now available to the Department to discharge its duties to implement sections 4 through 14 of this Act[; Provided, however,]*: Provided, That by mutual agreement, such funds shall be made available to the Federal Emergency Management Agency to discharge its duties under section 12 of this Act: Provided further,* That the provisions of sections 6 and 7 of this Act shall not be affected by this section*: And Provided further, in addition, Indian tribes may be eligible under Public Law 93-638 to contract for studies of Indian lands required under the provisions of this Act.*

Mr. ABDNOR. Mr. President, I am very pleased to bring before the Senate today, S. 1696, the Colorado River Floodway Protection Act.

There are very few bills that almost everyone can agree are good government legislation. I believe that S. 1696 is one of those.

S. 1696 has two basic purposes: First, it is intended to save Federal dollars by getting the U.S. Government out of the business of subsidizing development in the floodplain below Davis Dam on the Colorado River; and second, it will help to diffuse a potential dispute between those who wish to retain present levels of water storage behind the federally operated dams on the Upper Colorado River and those who would prefer to see the dams provide a higher level of flood control.

Mr. President, the Colorado River is one of the most highly regulated river systems in the Nation. The numerous dams on the Colorado River system represent a multibillion dollar Federal and State investment. These dams yield enormous flood control, water supply, and hydroelectric benefits.

Following the construction of the Bureau's Glen Canyon Dam in 1963, a temporary, 17-year flow regime of highly controlled water supply releases was experienced along the Lower Colorado River as Lake Powell was filled. This condition seems to have provided a false sense of security which allowed local residents and businesses to ignore the repeated warnings of the Bureau of Reclamation and the Corps of Engineers not to build in the floodplain downstream of Hoover Dam.

However, when the filling of Lake Powell was completed in 1980, the river returned to its previous flow regime of frequent flood control releases. The serious flooding that occurred during 1983, 1984, and 1985 is ample demonstration of this fact.

Despite these flood control releases and despite the best efforts of the Bureau of Reclamation to discourage it, development within the flood plain continues. Testimony received by the Committee on Environment and Public Works indicated that this development presents a serious problem with respect to the Bureau's ability to operate the upstream reservoir system.

One of the reasons for this situation is the fact that numerous Federal grants, subsidies, and programs which encourage development are available within the floodway. These include such things as Federal flood insurance, sewer and highway grants, Federal property leases, and loans to small businesses.

Furthermore, in the event of flooding, many of the residences and businesses in the floodway are eligible for Federal disaster relief or flood insurance payments.

For example, in 1983, 1984, and 1985, flooding on the lower Colorado River caused millions of dollars of damage to homes, businesses, and public facilities. During 1983 alone, the Federal Government paid $3 million in flood insurance claims and $4.9 million in

other forms of disaster relief for flood-related damages in the floodway area. If the development of the floodplain continues, Federal expenditures due to flooding in the area can be expected to increase.

Perhaps more importantly, if the development of the floodplain continues, it can be expected that pressure to increase the flood storage capacity of the upstream dams will mount. Such an increase of flood storage capacity can only be obtained at the expense of the water supply storage behind the dams. The Bureau of Reclamation has calculated that to provide the flood control storage necessary to prevent the flood flows of 1983, water supply storage valued well in excess of $1 billion would have to be foregone. Since the resulting flood control benefits would in no way approach this level of magnitude, such a reallocation of resources is clearly unacceptable.

Mr. President, as I stated earlier, the main purpose of S. 1696 is to withdraw Federal assistance for new development within the Colorado River floodplain. The bill requires the establishment of a federally declared floodway after an extensive study and public participation process. Within the floodway, most forms of Fedral development-related assistance would be prohibited for new development.

The bill is more than fair to those who have already built within the floodplain. For them, Federal flood insurance—within certain limits—and many forms of Federal disaster relief would remain available.

Although Federal leasing would be required to be consistent with protection of the floodway, the bill contains no zoning or restrictions on the use of private land. That remains the responsibility of local governments. Residents of the affected areas will be allowed to build anywhere they could legally build under existing law, and to obtain traditional forms of bank financing for such construction, as well as any available private flood insurance.

Furthermore, the bill does not tell the Bureau of Reclamation or the Corps of Engineers how to manage the Colorado River. If management changes are necessary or desirable, they can be made in the same manner in which they would be made now. Section 9 of S. 1696 specifically preserves all necessary legal authority for both agencies, and generally protects the existence and operation of the law of the river.

S. 1696 has the unanimous support of all of the States in the Colorado River Basin and enactment of the bill will accomplish several important objectives: First, it will protect existing conservation storage along the Colorado River, thus reducing the need for new water project construction in a growing area of the country. Second, maintenance of the floodway as specified in this legislation will decrease future flood damages. Third, because a more natural flood flow regime can be assured, downstream riparian fish and wildlife habitat is likely to be enhanced.

Further, implementation of S. 1696 will require a very small Federal expenditure, and if the benefits which are expected from this legislation are realized, the Federal Government will actually save tens of millions of dollars over the next several decades.

Mr. President, the committee reported version of S. 1696 which is before the Senate today is a carefully crafted compromise bill. It is legislation that provides great benefits to the Federal Government and local water users while at the same time doing little if any harm to those who live downstream of Davis Dam and currently benefit from Federal development subsidies.

When it approved the Coastal Barriers Resources Act during the 97th Congress, Congress gave explicit recognition to the idea that in certain areas of high risk, Federal development assistance and incentives should be withdrawn. The Committee on Environment and Public Works again recommends this approach to the Senate as the best way to address the serious problems caused by the continued development of the Lower Colorado River floodplain.

Finally, Mr. President, I would like to express my appreciation for the farsightedness of Senator GOLDWATER who originally introduced this measure, I would also like to thank Senators SIMPSON and DECONCINI who, along with Senator GOLDWATER, went well beyond the call of duty to insure that the committee bill is an excellent one. In addition, I would also like to thank our colleagues on the Committee on Energy and Natural Resources who have worked with us at every stage in perfecting the bill which is now before the Senate.

Mr. President, as I stated at the beginning of my remarks, this is truly a piece of good Government legislation and I urge my colleagues to give it their full support.

I ask unanimous consent that the section-by-section analysis from the committee report on S. 1696 be produced at this point in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SECTION-BY-SECTION ANALYSIS S. 1696

Section 1. The Short Title.

Section 2. *Congressional Findings and Purposes.* Congress finds that maintenance of the Colorado River Floodway is essential to accomplish the multiple purposes of the dams and other control structures on the Colorado River. Congress finds that certain federal programs which subsidize or permit development within the Floodway threaten human life, health, property, and natural resources. Congress finds further that coordinated Federal, State and local action is necessary to limit floodway development.

The purposes of the Act are to: "establish the Colorado River Floodway . . . to provide benefits to river users . . ." and to "estabish a Task Force to advice the Secretary of the Interior and the Congress on establishment of the Floodway and on managing existing and future development within the Floodway . . ."

Section 3. *Definitions.* The definition of the term "financial assistance" is virtually identical to the definition contained in the Coastal Barrier Resources Act, P.L. 97-348.

Section 4. *Colorado River Floodway Task Force.* This section establishes a Colorado River Floodway Task Force and specifies its membership and functions. The Task Force is to consider and make recommendations to the Secretary of the Interior and to the Congress concerning "the means to restore and maintain the Floodway . . ." including any necessary additional legislation; "the necessity for additional Floodway management legislation . . ."; "design criteria for the creation of the floodway boundaries . . ."; "the review of mapping procedures"; the possibility of "compensation . . . in specific cases of economic hardship resulting from impacts of the 1983 flood on property outside the Floodway which could not reasonably have been foreseen"; and, "The potential application of the Floodway on Indian lands and recommended legislation or regulations needed . . .". The Task Force membership will contain representatives of a wide variety of local, State and Federal interests. The Committee anticipates that federal agencies will actively participate in Task Force activities, so that local and State views will receive a full hearing.

Section 5. *Colorado River Floodway.* This section requires the Secretary of the Interior, in consultation with the seven Colorado River Basin States, the Colorado River Floodway Task Force, and other interested parties, to

(1) complete a study of the tributary floodflows downstream of Davis Dam; and

(2) define the specific boundaries of the Colorado River Floodway so that the Floodway can accommodate either a one-in-one hundred year river flow consisting of controlled releases and tributary inflow, or a flow of forty thousand cubic feet per second (cfs), whichever is greater, from below Davis Dam to the Southerly International Boundary between the United States of America and the Republic of Mexico.

The standard level of protection that has been adopted in the administration of the National Flood Insurance Act is the one-in-one hundred year frequency flood. The Corps of Engineers has determined that 40,000 cubic feet per second (cfs) is the maximum release rate that historically would have inflicted a minimum level of downstream damages and has incorporated this flow level in its Hoover Dam flood control regulations continually since 1935. Consequently, the boundaries of the Colorado River Floodway should be capable of accommodating a one-in-one hundred year river flow or a 40,000 cfs flow, whichever is greater, from Davis Dam to the Southerly International Boundary between the United States and Mexico.

It is the Committee's judgment that the Secretary's analysis of the one-in-one hundred-year river flow should represent a realistic one-in-one hundred-year probability of such flow occurring in any reach of the river at a given time, and should not arbi-

trarily assume that flood inflows from all tributaries occur simultaneously. It is the nature of weather events along the Lower Colorado River, a desert region, that most rain storms are intense, localized thunder showers that would produce floods from only a few tributaries at a time, and the Secretary's study should reflect this.

Section 6. *Limitations on Federal Expenditures Affecting the Floodway.* This section states that, except as provided in Section 7, no new expenditures or new financial assistance may be made available under authority of any Federal law for any purpose within the Floodway.

Section 7. *Exceptions.* There are several functions and uses of the floodway that serve the public interest, and are generally compatible with floodway operation. This section recognizes those functions and uses by providing limited exceptions, generally subject to Secretarial discretion, to the prohibition on federal expenditures. These exception are enumerated as public and tribal roads, military activities, fish and wildlife enhancement projects, navaigation aids, emergency action assistance, public health assistance, public and Tribal recreational developments, and compatible agricultural uses that do not involve permanent crops and include only a minimal amount of permanent facilities in the floodway.

In general, the term "permanent crops" is to mean those crops which have a normal life of five years or more or which would be an obstruction to river flood flows. In this regard, crops such as alfalfa, grains such as wheat, barley, oats, etc., asparagus, cotton, lettuce, cauliflower, melons, tomatoes, carrots, etc., should not be considered "permanent crops" for the purposes of this bill. However, date, citrus, pistachio, or pecan trees would be examples of "permanent crops".

Similarly, "permanent facilities" are those improvements that would obstruct river flood flows. Therefore, facilities such as canals, laterals, etc., should not be regarded as "permanent facilities" for the purposes of this Act.

In addition, river control structures and related works are also exempted under this section. Attention should be given to the control of tributary flows, and erosion problems. The Secretary has authority to review tributary inflow systems both on and off reservation lands. Additionally, the Secretary can review progress on the bank stabilization program on the reservations along the Lower Colorado and determine whether additional work is necessary in this regard.

This section also includes language which makes permissible federal funding of certain aspects of the proposed Yuma Crossing Park development. Specifically, the bill will permit federal funds to be used for restoration activities at National Historic Landmarks, and utility or interpretive improvements which are essential or closely related to the purpose of restoring these National Historic Landmarks. The utility improvements must be floodproofed in accordance with sound engineering practice wherever and whenever possible. The Committee has been informed that the cost of improvements which are permissible under this section will not exceed $225,000 (1986 dollars).

Section 8. *Certification of Compliance.* This section requires that the Secretary of the Interior certify to Congress on an annual basis that federal agencies are in compliance with this Act.

Section 9. *Priority of Laws.* Section 9 contains a series of provisions to make certain that current law and regulations governing the operation of the Colorado River, often referred to as the "Law of the River," are not affected by the Act. Since the River and reservoir management programs currently in effect are established under current laws and regulations, these programs will be unaffected as well.

Section 10. *Separability.*

Section 11. *Reports to Congress.* This provision requires the Secretary of the Interior to report to Congress within one year after the date of enactment of the Act with respect to: (1) the Colorado River Floodway, (2) the report of the Colorado River Floodway Task Force, and (3) his further recommendations concerning Floodway matters.

Section 12. *Amendments regarding Flood Insurance.* Section 12 conforms certain provisions of the National Flood Insurance Act to this Act. Specifically, it grandfathers flood insurance coverage for existing development, and limits its availability for future development. This provision is modeled on the comparable provisions of the Coastal Barrier Resources Act ("CBRA"), P.L. 97-348. The definition of "new construction" is based on Federal Emergency Management Administration ("FEMA") regulations defining the term "insurable building" promulgated in implementing the CBRA.

Section 13. *Federal leases.* This section sets forth provisions controlling federal leasing within the Floodway. Leases of lands owned in whole or part by the United States (including Indian and other trust lands of the United States) are required to be consistent with the operation and maintenance of the Floodway. It also contains a separate, and parallel, provision for Lake Mohave.

This section also clarifies that, with respect to Indian lands held in trust by the United States within the floodway, leasing may take place if one or both of the following conditions are met: (1) if the activities for which the lands are leased are exempted under section 7 of this act, or (2) if no federal money for construction or operation and maintenance is provided and if the lessee, tribe, or individual has provided sufficient insurance or security to insure against all reasonably foreseeable, direct, and consequential damages to the property of the tribe, private persons, and the United States, which may result from the proposed lease.

Section 14. *Notices and Existing Laws.* Section 14 requires notice of certain provisions of existing law and of this Act to be given to residents of areas in the Floodway and to federal lessees. It provides for the continuation in the floodway area of the National Flood Insurance Program (except as specifically altered by the Act) and its integration with the requirements, including the mapping provisions, of this Act. The Department of the Interior, in carrying out its responsibilities under this Act, should work closely and on a cooperative basis with representatives of the Federal Emergency Management Agency ("FEMA") to ensure that existing programs, such as the National Flood Insurance Program, can be supplemented as inexpensively and effectively as possible.

Section 15. *Authorization of Appropriations.* Section 15 authorizes a total of $600,000 over a five year period, in addition to any other funds now available to the Department, for implementation of the Department's and FEMA's responsibilities under the Act. It also provides that Sections 6 and 7 are not affected by the provisions of this section. In addition, this section clarifies that Indian tribes may be eligible under Public Law 93-638 to contract for studies of Indian lands required under the provisions of this Act.

Mr. STAFFORD. Mr. President, as chairman of the Committee on Environment and Public Works, I am proud to recommend S. 1696 to my colleagues in the Senate.

As the distinguished chairman of the Water Resources Subcommittee, Senator ABDNOR, has said, S. 1696 is truly a good government piece of legislation.

The essence of the Colorado River Floodway Protection Act is to remove Federal development subsidies from an area which by its very nature should not be being developed.

The floodplain below the Davis Dam is itself an important part of the upstream dams on the Colorado River; it serves as an escape valve for the flood control releases from these dams. It, therefore, makes no sense for the Federal Government to continue to provide development assistance for those who want to locate in this floodplain.

This bill does not forbid development on private land in the floodplain; it merely assures that those who do wish to build there will assume the risk themselves.

Mr. President, S. 1696 is a very fair piece of legislation. It insures that there will be ample local representation during the actual delineation of the floodway boundaries, and it contains extensive protections for those who already live and earn their living within those boundaries.

Mr. President, S. 1696 is strongly supported by all of the Colorado River Basin States and I urge its adoption.

Mr. GOLDWATER. Mr. President, the Colorado River Floodway Protection Act is very important legislation for my State of Arizona. The Colorado River is a major source of water for Arizona as it is to a greater or lesser extent for the six other Colorado River Basin States, New Mexcio, Wyoming, Colorado, Utah, California, and Nevada.

Over 18 million people from Denver to San Diego use the waters from this majestic river to literally make the desert bloom. Colorado River water is used to irrigate over 1 million acres for agriculture and to supply the water needs for thousands of people in their homes and in their work places from major cities, such as Phoenix and, in the future, Tucson, to small towns from Vernal, UT, to Parker, AZ.

The dams on the Colorado River are a major source of energy and the lakes formed behind them provide wonderful recreational opportunities. Fish and wildlife are enhanced by the river and the wildlife refuges along its banks. Important flood control benefits have resulted from the construc-

tion of Flaming Gorge, Glen Canyon, Hoover, Davis, and Parker Dams.

Because of the river's location in the arid Western part of our Nation and its flow through parts of seven Western States, there is already greater allocation of Colorado River water than can be supplied in a normal rainfall year. Therefore, it is of the utmost importance that the river be managed in a manner which will result in the greatest conservation of water.

In order to control development in the river's flood plain, I introduced this bill, which is a companion bill to H.R. 1246 introduced by Congressman CHENEY. H.R. 1246 has passed the House. The purpose of my bill is to establish a Federal floodway of at least 40,000 cubic feet per second from below Davis Dam to the United States-Mexican border, a distance of 250 miles, or a 1 in 100 year river flow, whichever is greater.

This legislation is modeled after the Coastal Barriers Resources Act, which eliminates Federal assistance programs within fragile coastal areas, and the same would be the case for land in the designated floodway. Certain activities, such as agriculture and recreation, would continue, but no permanent structures could be built which would have any type of Federal aid in the form of flood insurance loans or grants. All present structures within the designated floodway will be grandfathered.

All the Governors and water resources directors of the seven basin States support this bill, which will provide flood protection and maximum water storage and conservation.

I want to express my appreciation to Senator STAFFORD, chairman of the Environment and Public Works Committee, and Senator JAMES ABDNOR, chairman of the Subcommittee on Water Resources, for their outstanding efforts in bringing this bill before the Senate.

● Mr. SIMPSON. Mr. President, the Colorado River Floodway Protection Act is a very important piece of legislation that will affect all of the States along the lower Colorado River Basin. This includes my State of Wyoming. I extend my appreciation to Senators ABDNOR and MOYNIHAN for moving this legislation through the subcommittee hearing process. Furthermore, I appreciate the efforts of Senators GOLDWATER and DECONCINI in framing a workable compromise on some of the very difficult issues contained in the original legislation. My fine sidekick in the House, DICK CHENEY, is to be richly praised for his perseverance.

The headwaters of the Green River—a river which is a major tributary of the Colorado River—are found in the western portion of Wyoming. This legislation, however, focuses on the Colorado River and its unusually high river flows from Davis Dam, located on the Arizona-Nevada State line, south to the United States-Mexico border, some 250 miles downstream.

This legislation recognizes the natural fact that the Colorado River will periodically flood, despite the major river control provided by existing dams all along the stretch of the Colorado. This flooding potential was graphically illustrated during 1982 and 1983. As a result of these floods, local residences and businesses were wiped out. This destruction was followed by appeals for Federal assistance through Federal flood insurance, Federal emergency assistance, and the like. After these major floods, development continued anew. This development actually and blatantly occurred between the Bureau of Reclamation's flood control levees.

Because of the very real potential for future flooding and the attendant loss of life and property, it is now necessary to withdraw most forms of Federal assistance to new development within the area along the Colorado River. This legislation will achieve that goal and place the risk of development squarely upon those who choose to take that risk.

By enacting this legislation, the Senate will simply establish a course of conduct which says that if an individual wishes to place a business or residence within the floodway, that individual may do so at his or her own risk. He or she should not expect that risk to be insured by the Federal Government.

Mr. President, this legislation makes ultimate good sense and will make good law. I do earnestly urge my colleagues to favorably consider S. 1696.●

(By request of Mr. DOLE, the following statement was ordered to be printed in the RECORD:)

Mr. DECONCINI. Mr. President, I have worked with members of the Environment and Public Works Committee and sponsors of the Colorado River Floodway legislation in both bodies to insure that the actions of the Federal Government in establishing a permanent floodway for the Colorado River do not create unforeseen difficulties for communities and individuals along the river. I commend my colleagues for their efforts in addressing the concerns which have been raised by Indian tribes whose reservations are located in the floodway as well as the concerns of communities on both sides of the river. I think the modifications agreed to will ease some of the greatest fears and prevent Federal intrusions which really have no bearing on the intent of this legislation. I want to take this opportunity to express my appreciation to the chairman of the Water Resources Subcommittee, Mr. ABDNOR, the ranking minority, Mr. BENTSEN, and their staffs for their responsiveness and diligent efforts to improve his legislation.

The amendments we have drafted to S. 1696 make clear that the Secretary of the Interior will take into consideration the task force recommendations prior to drawing up the boundaries of the floodway. This is a very important modification, Mr. President. It gives the task force a valid role to play in the formulation of the floodway boundaries.

Other changes to the bill which are addressed by the amendments relate to the continued development of a historical park area known as the Yuma crossing and associated sites in the Yuma area. The provision included in the Senate reported bill insures that development consistent with floodway management can be undertaken in the future. On the subject of tributary inflows, language has been included in the committee report which recognizes the need for close attention to the tributary waters flowing into the Colorado. A great deal of concern was expressed by communities along the river that tributary inflows need to be monitored to insure that much greater than 1 in 100 year flows in the Colorado would not occur because of unknown or unexpected flows into the Colorado from its tributaries. It is my hope that the Secretary of the Interior will review the tributary inflow control system to insure that large releases are not occurring simultaneously with large releases from below Davis Dam on the Colorado River.

Mr. President, even with the modifications incorporated in the committee bill, I cannot support S. 1696. I continue to believe we should seek the input from all affected parties prior to taking final actions on a permanent floodway for the Colorado. I do not disagree with the need to establish a clear and decisive policy for the management of the criteria for the operation of Bureau of Reclamation structures on the Colorado River, which S. 1696 will do. However, I do have concerns about the way in which we are undertaking this management. I sponsored alternative legislation on this issue establishing a task force to determine what the proper management of the floodway should be. My legislation would create a task force, consisting of Federal, State, and local governmental officials, which would be charged with reviewing past operations of the dams which regulate the flow of water in the Colorado, examining damage from floods created by the 1983 releases, and making recommendations to the President and the Congress on the future size of the floodway, construction, Federal expenditures, and need for additional legislation. S. 1696, on the other hand, establishes a federally recognized floodway to accommodate either a 1 in 100 year flood or a flow of

40,000 cubic feet per second. A task force is created to make recommendations to the Secretary of the Interior and the Congress on management of the river.

This legislation has enormous ramifications for communities and individuals along the Colorado River. I would feel much more comfortable if we adopted legislation directing a task force to review all consequences first. However, I understand there is considerable support for this legislation both by the administration and among my colleagues. For this reason, I will let the legislation go with the modifications made and hope that potential future problems that may occur as a result of the legislation can be dealt with legislatively at that time.

Mr. President, again I thank my distinguished colleagues on the Environment and Public Works Committee. I commend Senator GOLDWATER, Congressman UDALL, and Congressman CHENEY for all of their efforts on this legislation.

Mr. JOHNSTON. Mr. President, this bill is made necessary by a curious set of circumstances. Following the construction of Glen Canyon Dam in 1963, releases into the lower Colorado River were limited for the following 17 years as Lake Powell began to fill. Despite warnings from the Bureau of Reclamation and the Corps of Engineers that greater flood control releases would eventually be necessary, local residents and businesses began building on the floodplain of the river. This development continues today and threatens the Bureau's ability to operate the upstream reservoir system. Part of the problem is that numerous Federal grants, subsidies, and programs that encourage development are available within the floodplain.

The principal purpose of S. 1696 is to withdraw Federal assistance for development within the floodway. At the same time, currently existing development would be grandfathered. The bill has other provisions, but this is the crux of it.

Because of the Bureau of Reclamation's involvement in managing the Colorado River and because of the responsibilities of the Committee on Energy and Natural Resources in overseeing the Bureau's programs, the committee was given sequential referral of S. 1696 following its consideration by the Committee on Environment and Public Works. The Committee on Energy and Natural Resources supports S. 1696, as reported by the Committee on Environment and Public Works, and for this reason elected not to mark up the bill separately.

Mr. President, I believe this bill represents a wise solution to a difficult problem, and I urge its immediate passage.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, and was read the third time.

Mr. DOLE. Mr. President, I ask unanimous consent that the Environment and Public Works Committee be discharged from further consideration of H.R. 1246, the House companion bill, and I ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 1246) to establish a federally declared Floodway for the Colorado River below Davis Dam.

There being no objection, the Senate proceeded to consider the bill.

Mr. DOLE. Mr. President, I move to strike all after the enacting clause and insert the text of S. 1696, as amended.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Kansas.

The motion was agreed to.

The PRESIDING OFFICER. The question is on the engrossment of the amendment and third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

The bill (H.R. 1246), as amended, was passed.

Mr. DOLE. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

PLAN AND DESIGN OF THE NATIONAL AIR AND SPACE MUSEUM

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate turn to Calendar No. 863, S. 1311, dealing with the Smithsonian Institution.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (S. 1311) to authorize the Smithsonian Institution to plan, design, and construct facilities for the National Air and Space Museum.

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Rules and Administration, with an amendment to strike out all after the enacting clause, and insert the following:

That the Smithsonian Institution is authorized to plan, design, and construct facilities for the National Air and Space Museum at Washington Dulles International Airport.

SEC. 2. (a) The Smithsonian Institution is authorized to develop a master plan for expansion of the National Air and Space Museum at Washington Dulles International Airport as will not interfere with the operations of such airport.

(b) There are hereby authorized to be appropriated for fiscal years 1987 and 1988 a total of $1,000,000 to the Smithsonian Institution for master planning activities as provided in subsection (a).

SEC. 3. No Federal funds are authorized for the construction of any facilities provided for by section 1 of this Act.

SEC. 4. (a) The Board of Regents of the Smithsonian Institution is authorized to construct the Charles McC. Mathias, Jr. Laboratory for Environmental Research.

(b) The Charles McC. Mathias, Jr. Laboratory for Environmental Research shall be located at the Smithsonian Environmental Research Center, a bureau of the Smithsonian Institution, located at Edgewater, Maryland.

(c) Effective October 1, 1986, there is authorized to be appropriated to the Board of Regents of the Smithsonian Institution $1,000,000 to carry out the purposes of this section.

(d) Any portion of the sums appropriated to carry out the purposes of this section may be transferred to the General Services Administration which, in consultation with the Smithsonian Institution, is authorized to enter into contracts and take such other action, to the extent of the sums so transferred to it, as may be necessary to carry out such purposes.

AMENDMENT NO. 2821

(Purpose: To express the sense of the Congress on recognition of the contributions of the seven Challenger astronauts by supporting establishment of a Children's Challenger Center for Space Science)

Mr. DOLE. Mr. President, I send an amendment to the desk on behalf of Senator GARN to the committee substitute.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Kansas [Mr. DOLE] for Mr. GARN and Mr. GLENN proposes an amendment numbered 2821.

Mr. DOLE. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of the bill, add the following:

SEC. . (a) The Congress finds that—

(1) the crew of the space shuttle Challenger was dedicated to stimulating the interest of American children in space flight and science generally;

(2) the members of the crew gave their lives trying to benefit the education of American children;

(3) a fitting tribute to that effort and to the sacrifice of the Challenger crew and their families is needed; and

(4) an appropriate form for such tribute would be to expand educational opportunities in science by the creation of a center that will offer children and teachers activities and information derived from American space research.

(b) It is the sense of the Congress that—

(1) a Children's Challenger Center for Space Science should be established in conjunction with the Smithsonian Institution as a living memorial to the seven Challenger astronauts who died serving their country and to other individuals who gave their lives in exploration of the space frontier; and

(2) the Federal Government should, along with the Smithsonian Institution public and private organizations and persons, cooperate in the establishing of such a Center.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 2821) was agreed to.

Mr. GOLDWATER. Mr. President, S. 1311 authorizes the Smithsonian Institution to add a facility for the National Air and Space Museum at Washington Dulles International Airport. It also recognizes the significant achievement of our colleague, CHARLES MCC. MATHIAS, by authorizing the construction of a new research lab at the Smithsonian Environmental Research Center at Edgewater, MD, in his honor and by providing $1 million for this facility.

The legislation authorizes $1 million for master planning for the National Air and Space Museum expansion, but provides that all the funds for construction shall come from the private sector or other non-Federal sources. No appropriations are authorized to construct the buildings for any part of the project.

In 1983 the Regents of the Smithsonian Institution voted to expand the National Air and Space Museum at Dulles. This expansion at an active airport was necessary due to the difficulty of delivering and displaying large modern air and spacecraft at the Institution's facility on The Mall in Washington.

At its meeting of September 16, 1985, the Regents of the Smithsonian unanimously endorsed the purposes of S. 1311 specifically including the construction authority.

As you may know the space shuttle *Enterprise* is now sitting at Washington Dulles awaiting a permanent home. It and other large artifacts can only be displayed at a facility which has sufficient ramp space to allow movement of the craft and access to a runway.

At present, more than 10 million people a year visit the National Air and Space Museum on The Mall. Only 25 percent of the National Air and Space collection can be viewed by the public and the existing Mall facility is just not large enough to cope with either more exhibits or more visitors. Moreover, the new facility at Dulles will give visitors an opportunity to see outstanding craftmen and artisans at work restoring historically significant airplanes.

Mr. President, I am very confident that the Smithsonian can raise the full amount of construction funds through grassroots donations from all over the world, business contributions, and through some State and local support. In fact the cost of the first stage building can likely be repaid through concessions revenues and parking once the facility is in operation.

The National Air and Space Museum has a history of sucessfully raising funds for film productions, seminars, and research, and it has the greatest visitation of any museum in the world. I have the utmost confidence that this project can be completed successfully without Federal funds and I am urging your support for the authorization of this project and development of a master plan to assist in the fundraising effort.

The air and space sciences touch every part of our daily lives. They affect the way we communicate, travel, enjoy our leisure time, and do business. Air and space is at the cutting edge for new technology and technology has replaced territorial expansion as the essence of world power and economic health. Space is our new frontier. Transportation will be key to unlocking that new frontier in space as it is on Earth. America's standard of living and that of other Western nations will be dependent upon our ability to continue to lead in air and space technology.

It has been our great fortune to live in the early years of the age of flight and at the dawn of the space age. The dream of flying has stirred the soul of man for hundreds, perhaps thousands, of years, but only during this century have we developed the principles of man-made flight materials, technology, fuels, and resources to shrink our world and even our solar system. Flight has given us new perspectives on our daily lives. We have soared from man's first powered flight a few feet above the North Carolina sand to the Moon, to untethered walks in outer space and to automated exploration of the planets in the span of just eight decades.

The Smithsonian Institution, clearly recognizing the tremendous impact that air travel and space exploration has had on our lives, wisely developed the National Air and Space Museum here in Washington. On July 2 of this year we celebrated the museum's 10th anniversary, and in its first decade over 100,000,000 people have been helped to better understand aviation and our world at the new National Air and Space Museum on The Mall. That is an astounding statistic and a clear indication that the people of America appreciate the importance of air and space. I hope all of my colleagues in this body will join me in helping to stimulate the interest in air and space and to further the dissemination of knowledge about modern technology by approving S. 1311 and authorizing this new facility as an adjunct to the existing National Air and Space Museum.

The PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on agreeing to the committee amendment in the nature of a substitute, as amended.

The committee amendment in the nature of a substitute, as amended, was agreed to.

The PRESIDING OFFICER. The question is on the engrossment and the third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

So the bill (S. 1311) was passed, as follows:

S. 1311

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Smithsonian Institution is authorized to plan, design, and construct facilities for the National Air and Space Museum at Washington Dulles International Airport.

SEC. 2(a) The Smithsonian Institution is authorized to develop a master plan for expansion of the National Air and Space Museum at Washington Dulles International Airport as will not interfere with the operations of such airport.

(b) There are hereby authorized to be appropriated for fiscal years 1987 and 1988 a total of $1,000,000 to the Smithsonian Institution for master planning activities as provided in subsection (a).

SEC. 3. No Federal funds are authorized for the construction of any facilities provided for by section 1 of this Act.

SEC. 4. (a) The Board of Regents of the Smithsonian Institution is authorized to construct the Charles McC. Mathias, Jr. Laboratory for Environmental Research.

(b) The Charles McC. Mathias, Jr. Laboratory for Environmental Research shall be located at the Smithsonian Environmental Research Center, a bureau of the Smithsonian Institution, located at Edgewater, Maryland.

(c) Effective October 1, 1986, there is authorized to be appropriated to the Board of Regents of the Smithsonian Institution $1,000,000 to carry out the purposes of this section.

(d) Any portion of the sums appropriated to carry out the purposes of this section may be transferred to the General Services Administration which, in consultation with the Smithsonian Institution, is authorized to enter into contracts and take such other action, to the extent of the sums so transferred to it, as may be necessary to carry out such purposes.

SEC. 5. (a) The Congress finds that—

The crew of the space shuttle Challenger was dedicated to stimulating the interest of American children in space flight and science generally;

(2) the members of the crew gave their lives trying to benefit the education of American children;

(3) a fitting tribute to that effort and to the sacrifice of the Challenger crew and their families is needed; and

(4) an appropriate form for such tribute would be to expand educational opportunities in science by the creation of a center that will offer children and teachers activities and information derived from American space research.

(b) It is the sense of the Congress that—

(1) a Children's Challenger Center for Space Science should be established in conjunction with the Smithsonian Institution as a living memorial to the seven Challenger astronauts who died serving their country and to other individuals who gave their lives in exploration of the space frontier; and

(2) the Federal Government should, along with the Smithsonian Institution, public and private organizations and persons, cooperate in the establishing of such a Center.

Mr. DOLE. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

□ 1820

ORDERS FOR TUESDAY, SEPTEMBER 16, 1986

RECESS

Mr. DOLE. Mr. President, I ask unanimous consent that once the Senate completes its business today, it stand in recess until the hour of 9:30 a.m. on Tuesday, September 16, 1986.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECOGNITION OF CERTAIN SENATORS

Mr. DOLE. Mr. President, following the recognition of the two leaders under the standing order, I ask unanimous consent that the following Senators be recognized for special orders not to exceed 5 minutes each: Senators HAWKINS, PROXMIRE, LEVIN, DURENBERGER, BUMPERS, KASSEBAUM, and GORE.

The PRESIDING OFFICER. Without objection, it is so ordered.

ROUTINE MORNING BUSINESS

Mr. DOLE. Mr. President, following the special orders just identified, I ask unanimous consent that there be a period for the transaction of routine morning business not to extend beyond the hour of 10:30 a.m., with Senators permitted to speak therein for not more than 5 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. DOLE. Mr. President, at the conclusion of routine morning business, it would be the intention of the majority leader to turn to the conference report to accompany defense reorganization. As I understand it, that can be disposed of without a rollcall and would take about 20 minutes. It is a matter that the Presiding Officer, the distinguished Senator from Arizona, Senator GOLDWATER, has an interest in, along with the distinguished ranking member of that committee, Senator NUNN from Georgia, and they will be here at 10:30.

The PRESIDING OFFICER. Without objection, we will be here.

Mr. DOLE. And it will be the intention of the majority leader—and we will work this out with those who wish to speak on the Rehnquist nomination—to then try to take up some appropriation bills to fill in any gaps that we have.

As I understand it, there are two or three speakers and there is a very important memorial service that will take away many of our colleagues tomorrow morning. So we will probably go back and forth into legislative and executive sessions and hopefully wrap up the unfinished business on H.R. 5234, the Interior appropriations bill, and also the D.C. appropriations bill and perhaps the DOT appropriations bill.

I assume that may be all we can do, but I would also hope we might be able to turn to the highway bill sometime this week.

The vote on cloture will occur on Wednesday. Hopefully, shortly after that vote, if it is in the affirmative, we will be able to vote on the nomination, followed by the Scalia nomination.

ERADICATION OF ILLICIT DRUG CROPS

Mr. BYRD. Mr. President, I alerted the distinguished majority leader to my desire to clear rule XIV with respect to H.R. 5484.

Is there a House bill at the desk with that number, H.R. 5484?

The PRESIDING OFFICER. Yes, there is.

Mr. BYRD. Mr. President, I ask for its first reading.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 5484) to strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops, and in halting international drug traffic to improve enforcement of Federal drug laws, and enhance interdiction of illicit drug shipments to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.

Mr. BYRD. Mr. President, I ask for second reading of the bill.

Mr. DOLE. Mr. President, I object to further consideration of the bill.

The PRESIDING OFFICER. Objection is heard.

The bill will be held at the desk.

RECESS UNTIL TOMORROW AT 9:30 A.M.

Mr. DOLE. Mr. President, there being no further business to come before the Senate, I move the Senate stand in recess until the hour of 9:30 a.m., Tuesday, September 16, 1986.

The motion was agreed to and the Senate, at 6:29 p.m., recessed until Tuesday, September 16, 1986, at 9:30 a.m.

NOMINATIONS

Executive nominations received by the Secretary of the Senate after the adjournment of the Senate on September 12, 1986, under authority of the order of the Senate of January 3, 1985:

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Dale D. Myers, of California, to be Deputy Administrator of the National Aeronautics and Space Administration, vice William Robert Graham.

IN THE AIR FORCE

The following-named officer for appointment to the grade of general on the retired list pursuant to the provisions of title 10, United States Code, section 1370:

To be general

Gen. Richard L. Lawson, xxx-xx-xxxx FR, U.S. Air Force.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be general

Lt. Gen. Thomas C. Richards, xxx-xx-xxxx FR, U.S. Air Force.

The following-named officer, under provisions of title 10, United States Code, section 601, to be reassigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Lt. Gen. Casper T. Spangrud, xxx-xx-xxxx xxx-... FR, U.S. Air Force.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Maj. Gen. Claudius E. Watts III, xxx-xx-xx... xxx-... FR, U.S. Air Force.

Executive nominations received by the Senate September 15, 1986:

BOARD FOR INTERNATIONAL BROADCASTING

Ben J. Wattenberg, of the District of Columbia, to be a Member of the Board for International Broadcasting for a term expiring April 28, 1989. (Reappointment.)

FARM CREDIT ADMINISTRATION

Jim R. Billington, of Oklahoma, to be a Member of the Farm Credit Administration Board, Farm Credit Administration, for a term of 2 years. (New position.)

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

Kenneth Y. Tomlinson, of New York, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1991, vice Elinor M. Hashim, term expired.

U.S. POSTAL SERVICE

John N. Griesemer, of Missouri, to be a Governor of the U.S. Postal Service for the term expiring December 8, 1995. (Reappointment.)

IN THE ARMY

The Army National Guard of the United States officers named herein for appointment as Reserve commissioned officers of the Army, under the provisions of title 10, United States Code, sections 593(a), 3385, and 3392:

To be major general

Brig. Gen. Ronald Bowman, xxx-xx-xxxx.
Brig. Gen. Robert L. Blevins, xxx-xx-xxxx.

To be brigadier general

Col. William A. Hornsby, xxx-xx-xxxx.
Col. Louis C. Addison, xxx-xx-xxxx.
Col. Peter E. Genovese, xxx-xx-xxxx.
Col. Richard S. Schneider, xxx-xx-xxxx.
Col. Kenneth E. Wallace, xxx-xx-xxxx.
Col. Robert H. Wedinger, xxx-xx-xxxx.
Col. Thomas H. Alexander, xxx-xx-xxxx.
Col. George M. Borst, xxx-xx-xxxx.
Col. William S. Christy, xxx-xx-xxxx.
Col. Paul G. Durbin, xxx-xx-xxxx.
Col. George T. Glenn, xxx-xx-xxxx.
Col. Robert L. Gooderl, xxx-xx-xxxx.
Col. John M. Paden, xxx-xx-xxxx.
Col. Thomas R. Sprenger, xxx-xx-xxxx.
Col. Thomas T. Thompson, xxx-xx-xxxx.
Col. John W. Carlson, xxx-xx-xxxx.
Col. Wade R. Hedgecoke, xxx-xx-xxxx.
Col. Philip G. Randich, xxx-xx-xxxx.
Col. Thomas D. Schulte, xxx-xx-xxxx.
Col. Clinton V. Willis, Jr., xxx-xx-xxxx.
Col. Jacob J. Krull, xxx-xx-xxxx.

The following-named U.S. Army Reserve officer for appointment to the grade of brigadier general as a Reserve commissioned officer of the Army under the provisions of title 10, United States Code, sections 593(a) and 3384:

To be brigadier general

Col. Raymond C. Bonnabeau, Jr., xxx-xx-x...

EXTENSIONS OF REMARKS

SENATE COMMITTEE MEETINGS

Title IV of Senate Resolution 4, agreed to by the Senate on February 4, 1977, calls for establishment of a system for a computerized schedule of all meetings and hearings of Senate committees, subcommittees, joint committees, and committees of conference. This title requires all such committees to notify the Office of the Senate Daily Digest—designated by the Rules Committee—of the time, place, and purpose of the meetings, when scheduled, and any cancellations or changes in the meetings as they occur.

As an additional procedure along with the computerization of this information, the Office of the Senate Daily Digest will prepare this information for printing in the Extensions of Remarks section of the CONGRESSIONAL RECORD on Monday and Wednesday of each week.

Any changes in committee scheduling will be indicated by placement of an asterisk to the left of the name of the unit conducting such meetings.

Meetings scheduled for Tuesday, September 16, 1986, may be found in the Daily Digest of today's RECORD.

MEETINGS SCHEDULED

SEPTEMBER 17

9:00 a.m.
Impeachment Committee
To continue hearings on matters relating to the impeachment trial of the Honorable Harry E. Claiborne.
SR-325

9:30 a.m.
Governmental Affairs
Permanent Subcommittee on Investigations
To hold hearings on emerging foreign criminal groups in the United States.
SD-342

Judiciary
Criminal Law Subcommittee
Business meeting, to mark up S. 1203, to grant railroad police and private college or university police departments access to Federal criminal identification records.
SD-226

10:00 a.m.
Energy and Natural Resources
Business meeting, to consider pending calendar business.
SD-366

Judiciary
Business meeting, to mark up pending calendar business.
SD-226

10:30 a.m.
Agriculture, Nutrition, and Forestry
To hold hearings on the financial condition of the farm credit system.
SR-332

Banking, Housing, and Urban Affairs
Business meeting, to consider S. 430, to clarify the intent and modify certain provisions of the Foreign Corrupt Practices Act of 1977, and the nomination of Harold T. Duryee, of the District of Columbia, to be Federal Insurance Administrator, Federal Emergency Management Agency.
SD-538

Commerce, Science, and Transportation
To hold hearings on the nominations of Sonia Landau, of New York, and R. Kenneth Towery, of Texas, each to be a Member of the Board of Directors of the Corporation for Public Broadcasting.
SR-253

2:00 p.m.
Impeachment Committee
To continue hearings on matters relating to the impeachment trial of the Honorable Harry E. Claiborne.
SR-325

3:00 p.m.
Environment and Public Works
Environmental Pollution Subcommittee
To hold hearings on certain provisions of S. 1352 (pending on Senate calendar), and H.R. 1202, bills authorizing funds for fiscal years 1986, 1987, and 1988 for conservation programs on military reservations and public lands, and S. 2741, to establish the Bayou Sauvage Urban National Refuge in Louisiana.
SD-406

Foreign Relations
To hold hearings on the nominations of Elinor Greer Constable, of New York, to be Ambassador to the Republic of Kenya, David C. Fields, of California, to be Ambassador to the Central African Republic, David A. Korn, of the District of Columbia, to be Ambassador to the Republic of Togo, Ronald D. Palmer, of the District of Columbia, to be Ambassador to Mauritius, James D. Phillips, of Kansas, to be Ambassador to the Republic of Burundi, and James W. Rawlings, of Connecticut, to be Ambassador to Zimbabwe.
SD-419

SEPTEMBER 18

9:00 a.m.
Banking, Housing, and Urban Affairs
To hold hearings on the nominations of Simon C. Fireman, of Massachusetts, to be a Member of the Board of Directors of the Export-Import Bank of the United States, and Thomas T. Demery, of Michigan, to be an Assistant Secretary of Housing and Urban Development.
SD-538

Impeachment Committee
To continue hearings on matters relating to the impeachment trial of the Honorable Harry E. Claiborne.
SR-325

9:30 a.m.
Energy and Natural Resources
To resume oversight hearings on the domestic and international petroleum situation.
SD-366

10:00 a.m.
Environment and Public Works
Business meeting, to resume markup of S. 2340, to provide a system of liability and compensation for oil spill damage and removal costs.
SD-406

11:00 a.m.
Finance
To hold hearings on proposed legislation to provide for a 2-year extension of highway trust fund taxes; followed by a business meeting, to mark up the proposed legislation aforementioned, and S. 1860, Trade Enhancement Act.
SD-215

2:00 p.m.
Foreign Relations
To hold hearings on the nominations of Charles J. Pilliod, Jr., of Ohio, to be Ambassador to Mexico, Alexander F. Watson, of Maryland, to be Ambassador to the Republic of Peru, and Richard E. Bissell, of Virginia, and Thomas R. Blank, of Delaware, each to be an Assistant Administrator of the Agency for International Development.
SD-419

Impeachment Committee
To continue hearings on matters relating to the impeachment trial of the Honorable Harry E. Claiborne.
SR-325

Conferees
On S. 1128, Clean Water Act Amendments of 1985.
H-140, Capitol

4:00 p.m.
Veterans' Affairs
To resume closed hearings on the reported sightings of live military personnel missing in action in Southeast Asia.
SH-219

SEPTEMBER 19

9:00 a.m.
Energy and Natural Resources
Public Lands, Reserved Water and Resource Conservation Subcommittee
To hold hearings on S. 1971, to transfer certain lands to the city of Mesquite, Nevada; S. 2194, to convey certain lands to the Catholic Diocese of Reno/Las Vegas, Nevada; S. 2599, to declare that the United States holds certain public domain lands in trust for the Pueblo of Zia Indians in New Mexico; S. 2698, to transfer certain lands in Nevada to the Toiyabe, Humboldt, and Inyo National Forests; S. 2758, to authorize the exchange of certain lands in Nevada and Florida; S.J. Res. 372, to authorize the estabishment of a memorial in the District of Columbia to honor America's astronauts; S. 2812 and H.R. 4037, bills to revise the boundary of the Indiana Dunes Na-

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● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

tional Lakeshore; and H.R. 4645, to modify the boundaries of the Cuyahoga Valley National Recreation Area.
SD-366

Impeachment Committee
To continue hearings on matters relating to the impeachment trial of the Honorable Harry E. Claiborne.
SR-325

9:30 a.m.
Commerce, Science, and Transportation
Aviation Subcommittee
To hold hearings to examine air quality within airplanes.
SR-253

Finance
Health Subcommittee
To hold hearings to examine current Medicaid funding services provided for the long-term care of developmentally disabled persons.
SD-215

2:00 p.m.
Impeachment Committee
To continue hearings on matters relating to the impeachment trial of the Honorable Harry E. Claiborne.
SR-325

SEPTEMBER 22

2:30 p.m.
Commerce, Science, and Transportation
Business, Trade, and Tourism Subcommittee
To hold hearings to review travel and tourism statistics.
SR-253

SEPTEMBER 23

9:00 a.m.
Office of Technology Assessment
The Board, to meet to consider pending business.
EF-100, Capitol

9:30 a.m.
Commerce, Science, and Transportation
To hold oversight hearings on activities of the National Highway Traffic Safety Administration, and the implementation of the Motor Carrier Safety Act of 1984.
SR-253

Energy and Natural Resources
Public Lands, Reserved Water and Resource Conservation Subcommittee
To hold hearings on S. 2029 and H.R. 4090, bills to establish the Big Cypress National Preserve Addition in Florida, S. 2442 and H.R. 4811, bills to establish the San Pedro Reparian National Conservation Area in Arizona, H.R. 2921, to authorize the Secretary of Agriculture to issue permanent easements for certain water conveyance systems in order to resolve title claims arising under Acts repealed by the Federal Land Policy and Management Act of 1976, S. 2707 and H.R. 2826, bills to designate a segment of the Horsepasture River in North Carolina as a component of the National Wild and Scenic Rivers System.
SD-366

Rules and Administration
To hold hearings on S.J. Res. 268, to provide for the reappointment of Murray Gell-Mann as a citizen regent of the Board of Regents of the Smithsonian Institution, and to resume oversight hearings on the operations and functions of the Office of the Senate Sergeant at Arms.
SR-301

10:00 a.m.
Select on Indian Affairs
To hold oversight hearings on Indian Trust Funds.
SR-385

10:30 a.m.
Foreign Relations
Business meeting, to consider pending calendar business.
SD-419

11:00 a.m.
Veterans' Affairs
To hold hearings to review the legislative priorities of the American Legion.
SD-G50

SEPTEMBER 24

9:30 a.m.
Environment and Public Works
Nuclear Regulation Subcommittee
To hold hearings to review nuclear power safety measures in the aftermath of the Chernobyl nuclear powerplant accident.
SD-406

Select on Intelligence
To hold closed hearings on intelligence matters.
SH-219

10:00 a.m.
Energy and Natural Resources
Business meeting, to consider pending calendar business.
SD-366

Labor and Human Resources
Business meeting, to consider pending calendar business.
SD-430

SEPTEMBER 25

9:30 a.m.
Labor and Human Resources
Employment and Productivity Subcommittee
To hold hearings on the employment impact of United States/Japan autoparts trade relations.
SD-430

10:00 a.m.
Energy and Natural Resources
Business meeting, to consider pending calendar business.
SD-366

Environment and Public Works
To hold hearings on S. 2203, to establish a program to reduce acid deposition and other forms of air pollution.
SD-406

SEPTEMBER 26

9:30 a.m.
Governmental Affairs
Intergovernmental Relations Subcommittee
To hold hearings on comprehensive federalism reform.
SD-342

10:00 a.m.
Environment and Public Works
To continue hearings on S. 2203, to establish a program to reduce acid deposition and other forms of air pollution.
SD-406

SEPTEMBER 29

9:30 a.m.
Finance
Taxation and Debt Management Subcommittee
To hold hearings on S. 1974 and S. 1113, bills to prohibit the imposition by States of the worldwide unitary method of taxation.
SD-215

SEPTEMBER 30

10:00 a.m.
Foreign Relations
East Asian and Pacific Affairs Subcommittee
To hold hearings on United States trade relations with Taiwan and Korea.
SD-419

OCTOBER 1

10:00 a.m.
Energy and Natural Resources
Business meeting, to consider pending calendar business.
SD-366

2:00 p.m.
Foreign Relations
East Asian and Pacific Affairs Subcommittee
To hold oversight hearings on the North Pacific drift net fisheries.
SD-419

OCTOBER 2

10:00 a.m.
Energy and Natural Resources
Business meeting, to consider pending calendar business.
SD-366

CANCELLATIONS

SEPTEMBER 17

9:30 a.m.
Judiciary
Criminal Law Subcommittee
Business meeting, to mark up S. 1203, to grant railroad police and private college or university police departments access to Federal criminal identification records.
SD-226

SEPTEMBER 26

9:30 a.m.
Commerce, Science, and Transportation
Aviation Subcommittee
To hold hearings on proposed legislation authorizing funds for the Airport and Airway Trust Fund.
SR-253